No. 87-5565-CSX
Status: GRANTED

Title: Cherlyn Clark, Petitioner
v.
Gene Jeter

Docketed:
September 24, 1987

Court: Superior Court of Pennsylvania,
Pittsburgh Office

Counsel for petitioner: Welling,Evalynn B.

Counsel for respondent: Freeland,Wendell G., Griswold,Erwin N.

Supreme Court of PA den. petn. for allowance of appeal May 27, 1987.

Entry	Date	Note	Proceedings and Orders
1	Aug 13 1987		Application for extension of time to file petition and order granting same until September 24, 1987 (Brennan, August 14, 1987).
2	Sep 24 1987	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Oct 24 1987	G	Motion of Women's Legal Defense Fund for leave to file a brief as amicus curiae filed.
5	Oct 28 1987		Brief of respondent Gene Jeter in opposition filed.
6	Oct 29 1987		DISTRIBUTED. November 13, 1987
7	Nov 25 1987		REDISTRIBUTED. December 11, 1987
9	Dec 14 1987		Motion of Women's Legal Defense Fund for leave to file a brief as amicus curiae GRANTED.
10	Dec 18 1987		REDISTRIBUTED. January 8, 1988
12	Jan 11 1988		Petition GRANTED.
			**********
13	Feb 23 1988		Joint appendix filed.
14	Feb 24 1988		Brief of petitioner Cherlyn Clark filed.
15	Feb 25 1988		Brief amici curiae of Women's Legal Defense Fund filed.
16	Feb 25 1988		Brief amicus curiae of ACLU, et al. filed.
17	Mar 4 1988		Record filed.
		*	Certified original record received.
18	Mar 11 1988		SET FOR ARGUMENT, Tuesday, April 19, 1988. (3rd case).
19	Mar 25 1988		CIRCULATED.
20	Mar 26 1988	X	Brief of respondent Gene Jeter filed.
21	Apr 19 1988		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 87-5565

IN THE SUPREME COURT OF THE UNITED STATES

TERM,

CHERLYN CLARK,

Petitioner

vs.

GENE JETER,

Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Does a six-year statute of limitations for actions brought to establish paternity in support actions for children born out of wedlock violate the equal protection guarantee of the Fourteenth Amendment of the United States Constitution?

2. Does foreclosing a child's continuing right to paternal support after six years deprive the child of the due process guaranteed by the Fourteenth Amendment of the United States Constitution?

3. Is Pennsylvania's current eighteen-year paternity statute of limitations, which has been construed to be not retroactive to cases pending on appeal or previously barred by the now repealed six-year statute, in conflict with the federal Child Support Enforcement Amendments?

*The caption of this case contains the names of all the parties to this action.

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IN THE SUPREME COURT OF THE UNITED STATES

TERM,

CHERLYN CLARK,

Petitioner

vs.

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PETITION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, Cherlyn Clark, prays that a Writ of Certiorari issue to review the order of the Superior Court of Pennsylvania dated October 23, 1986.

OPINIONS BELOW

Cherlyn Clark's complaint for support for her out of wedlock child was dismissed by the Court of Common Pleas, Allegheny County, Pennsylvania on July 8, 1985. This unreported decision is attached as Appendix A. An appeal was taken to the Pennsylvania Superior Court, and the trial court's decision was affirmed by order and panel decision dated October 23, 1986, and reported at 358 Pa. Super. 550, 518 A.2d 276 (1986). A copy is attached as Appendix B. Thereafter the Superior Court denied Petitioner's

Application for Reargument, per curiam, on December 18, 1986 (attached as Appendix C). On May 27, 1987, the Pennsylvania Supreme Court denied her Petition for Allowance of Appeal, also per curiam, ____ Pa. ____, ____ A2d ____ (1987). A copy is attached as Appendix D.

JURISDICTIONAL STATEMENT

The Order of the Pennsylvania Supreme Court was dated and entered May 27, 1987. Petitioner moved this Honorable Court for an Extension of Time within which to file a Petition for Writ of Certiorari pursuant to 28 U.S.C. §2101(c). By order dated August 14, 1987, Justice William J. Brennan, Jr. granted Petitioner's motion and extended the filing date until September 24, 1987. This Petition for a Writ of Certiorari is filed within this period. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides that:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The statutory provisions involved are

1. PA. CONS. STAT. ANN., Tit. 42 §6704(e) (Purdon 1982) (repealed 1985, Oct. 30, P.L. 264, No. 66 §3, effective in 90 days):

> (e) Limitation of actions. - All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father.

2. PA. CONS. STAT. ANN. Tit. 23 §4343(b) (Purdon Supp. 1987) (1985, Oct. 30, P.L. 264, No. 66, §1, effective in 90 days):

> (b) Limitation of actions. - An action or proceeding to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of the birth of the child.

3. 42 U.S.C. §666(a) and §666(a)(5):

> 42 U.S.C. §666. Requirement of statutorily prescribed procedures to improve the effectiveness of child support enforcement

a) Types of procedures required:

In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with the regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:

...

(5) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.

STATEMENT OF THE CASE

Cherlyn Clark and Gene Jeter began seeing each other socially in 1971. Tiffany Clark was born to Cherlyn on June 11, 1973. Gene Jeter made intermittent voluntary contributions to her support up until June 1981. In August 1983 Petitioner filed a support complaint against Gene Jeter. Blood tests ordered by the trial court thereafter revealed a 99.33% probability that Gene Jeter is Tiffany's father.

In the trial court Respondent Jeter raised the defense that Petitioner's claim should be time-barred by the six-year statue of limitations then in effect. Petitioner asserted that the statute was unconstitutional because it violated equal protection and due process. The trial court upheld the constitutionality of the statute based on the Pennsylvania Supreme Court's decision in Astemborski v. Susmarski, 499 Pa. 99, 451 A.2d 1012 (1982), cert. granted, order vacated and remanded, 103 S.Ct. 3105 (1983), order reinstated, 502 Pa. 409, 466 A.2d 1018 (1983), pages 2-3, Order of Judge Strassburger, Appendix A. The trial court therefore dismissed Petitioner's support complaint.

Petitioner then appealed to the Superior Court of Pennsylvania, arguing again that the six-year statute of limitations in paternity actions for purposes of support

violated equal protection and due process. In a carefully reasoned opinion, the Superior Court pointed up the many inconsistencies between the short statute of limitations in paternity/support actions and the unlimited right to establish support in other sorts of cases. The Court also expatiated on the inequities of barring a child's right to support because of the parent's failure to file a timely complaint. Nevertheless, the Superior Court found itself to be bound by Astemborski v. Susmarski, supra, and upheld the constitutionality of the six-year limit. (Opinion of Superior Court, p. 5, Appendix B)

While the case at bar was pending before the Superior Court, Pennsylvania enacted an eighteen-year statute of limitations as part of a package of support program reforms mandated by the federal Child Support Enforcement Amendments. Petitioner requested that the Superior Court remand her case to the trial court to determine whether the eighteen-year statute should be applied to her case. The Superior Court denied this request on the same day it issued its opinion (Appendix B) holding that the eighteen-year statute was not retroactive and could not revive cases which would have been barred by the six-year statute.

This decision was made without permitting Petitioner to brief the issue. Therefore Petitioner filed a Motion for Reargument in which she argued that the federal Child Support Amendments compelled a retroactive application of the eighteen-year statute. This motion was denied per curiam. (Appendix C)

Petitioner then filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, arguing that the six-year statute offends equal protection and due process. She also argued the required retroactivity of the eighteen-year statute. The first question listed in the Statement of Questions Presented in her Petition for Allowance of Appeal was

> Should the new 18 year statute of limitations in paternity/support actions, 23 Pa. C.S. §4343(b), be applied retroactively to cases pending on appeal at the time of its enactment in light of the fact that Pennsylvania must comply with the federally mandated eighteen year retroactive support/paternity statute of limitations in order to receive federal monies for Pennsylvania support enforcement programs?

The Pennsylvania Supreme Court denied Cherlyn Clark's Petition for Allowance of Appeal, per curiam, on May 27, 1987. (Appendix D)

REASONS FOR GRANTING THE WRIT

I. Equal Protection

In recent years this Court has twice struck down state statutes of limitation imposed upon illegitimate children attempting to establish paternity as a prerequisite for obtaining support. Mills v. Habluetzel, 456 U.S. 91 (1982), invalidated a one-year statute of limitations on equal protection grounds, holding that one year was not long enough to provide adequate opportunity to file such a claim and that this time limit had no substantial relationship to the state's interest in preventing stale or fraudulent claims. The next year, a two-year statute of limitations for paternity/support actions was struck down for similar reasons in Pickett v. Brown, 462 U.S. 1 (1983).

After the Mills and Pickett decisions, the Supreme Court of Washington invalidated a six-year statute of limitations for paternity actions as a violation of equal protection while the high courts of Michigan and

Pennsylvania upheld their six-year statutes in spite of remands from this Court.[1] The Courts of Alabama and New York have divided over the propriety of five-year statutes.[2]

The next year this Court again noted probable jurisdiction to review the claim that Pennsylvania's six-year statute of limitations in paternity actions violates equal protection, in Paulussen v. Herion, 334 Pa. Super. 585, 483 A.2d 892 (1984); probable jurisdiction noted at 474 U.S. ___ (1985). Then, in October 1985, Pennsylvania enacted an eighteen year statute of limitations.[3] Therefore this Court vacated the judgment in

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1 See, State. ex rel. Adult and Family Services Division v. Bradley, 58 Or. App. 663, 650 P.2d 91, aff'd, 295 Or. 216, 666 P.2d 249 (1983); Daniel v. Collier, 113 Mich. App. 74, 317 N.W. 2d 293 (1982), vac. and remanded for consideration in light of Pickett v. Brown, 464 U.S. 805 (1983), on remand 130 Mich. App. 345, 343 N.W. 2d 16 (1983, released 1984); Astemborski v. Susmarski, 499 Pa. 99, 451 A.2d 1012, vac. and remanded for consideration in light of Pickett v. Brown, 462 U.S. 1127 (1983), on remand, 502 Pa. 409, 466 A.2d 1018 (1983).

2 Morgan County Dept. of Pensions ex rel. Ryan v. Kelso, 460 So. 2d 1333 (Ala. Civ. App. 1984); Patricia R. v. Peter W., 120 Misc. 2d 986, 466 N.Y.S. 2d 994 (1983).

3 Act No. 66 (October 30, 1985) 23 Pa. Cons. Stat. Ann. §4343(b) (Purdon Supp. 1987) provides as follows:

> §4343. Paternity.
>
> (b) Limitations of actions.--An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

Paulussen and remanded for a determination of whether the eighteen-year statute would be applied to pending cases which had been barred under the six-year statute. Paulussen v. Herion, ___ U.S. ___, 106 S.Ct. 1339 (1986).

In the meantime, the instant case was heard and both issues raised by Paulussen were decided therein by the Superior Court of Pennsylvania. First, the Superior Court reluctantly held that the six-year statute of limitations was not unconstitutional based on Astemborski v. Susmarski, 499 Pa. 99, 451 A.2d 1072, on remand 502 Pa. 407, 466 A.2d 1018 (1983). The Court also found that the eighteen-year statute of limitations could not be applied retroactively to cases pending on appeal at the time of its enactment. Moreover, cases barred under the six-year statute could not be revived by refiling under the new eighteen-year statute. Clark v. Jeter, 358 Pa. Super. 550, 518 A.2d 276 (1986). Cherlyn Clark's petition for allowance of appeal was subsequently denied by the Pennsylvania Supreme Court, ____ Pa. ____, ____ A.2d ____ (1987).

As a result, the question of whether Pennsylvania's six-year statute of limitations violates equal protection is now ready for resolution. Otherwise,

by continued operation of this statute, Tiffany Clark and thousands like her will be forever barred from obtaining support from their natural fathers.

The statute under consideration provides as follows:

> (e) Limitation of actions. All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgement by the reputed father.
>
> 42 Pa. Cons. Stat. Ann. §6704(e) (Purdon Supp. 1985)

As the Pennsylvania Superior Court concluded, this statute works a special hardship on out-of-wedlock children as compared with legitimate children:

> This action [for paternity] is included within the general provisions regarding support actions, and it applies only to an action to determine paternity brought pursuant to a support action. Therefore, it applies only to children born out of wedlock who must establish paternity prior to seeking support. It does not directly preclude all children from obtaining support after the six year period has run or after a putative father ceases to make voluntary support payments for two years, but only precludes children born out of wedlock from establishing paternity. However, because establishment of paternity is a prerequisite to a support order, the statute of limitations operates to deny children born out of wedlock the right to seek support long before they reach

> majority unless the child, through its guardian, has already had his paternity established.
>
> Clark v. Jeter, 358 Pa. Super. 550, 518 A.2d 276, 279 (1986)

Nevertheless, the Pennsylvania Superior Court found itself to be bound by the Pennsylvania Supreme Court's holding in Astemborski v. Susmarski, supra, that Section 6704(e) does not violate equal protection. An analysis of this Court's decisions, however, shows Astemborski to have been wrongly decided.

The equal protection analysis developed by Mills v. Habluetzel, supra, and followed by Pickett v. Brown, supra, to evaluate such statutes focused on two requirements. First, the period for obtaining support must be "sufficiently long to present a reasonable opportunity to assert such claims," Mills v. Habluetzel, supra, 456 U.S. at 97. The Mills decision suggested that "difficult personal, family, and financial circumstances that often surround the birth of a child out of wedlock," are reasons that a one-year period was too short to give adequate opportunity to mothers to file their claims. Justice O'Connor in her concurrence, which was joined by four other Members of the Court, suggested that other factors -- such as a continuing relationship between the parents or temporary support by the father -- might influence a mother not to file for support for a number of years. Therefore, "the risk that the child

will find himself without financial support from his natural father seems as likely throughout his minority as during the first year of life." (Justice O'Connor concurring), Mills v. Habluetzel, supra, 456 U.S. at 106.

To determine whether six years is sufficient time to permit suits to be brought, the Pennsylvania Supreme Court in Astemborski focused upon "birth-related encumbrances" which the court argued would be dissipated after the first several years, 466 A.2d at 1022. However, the problems cited by Justice O'Connor in Mills and reiterated by the Pickett court are more complex, long-lived sociol-economic problems which, as Justice O'Connor stated, "may continue years after the child is born." Mills v. Habluetzel, supra, 456 U.S. at 105 n.4.

The case at hand aptly illustrates this point. Long after the birth of Tiffany, Cherlyn Clark was too frightened of Defendant to acknowledge publicly that he was the father of her child. After her fear subsided, the Plaintiff's lack of education and general misapprehension of the legal system prevented her from finding out and understanding that filling out support assignment papers with the welfare department was not the same thing as filing a complaint for support. When she learned otherwise, the

statute of limitations had already run. Clearly, in such a situation the child's right is unfairly denied because of the mother's fear and lack of education.

The second prong of the Mills analysis requires that any time limitation placed on the opportunity to determine paternity to obtain support must be substantially related to the state's interest in litigating stale or fraudulent claims, 456 U.S. at 101-102. In both Justice O'Connor's concurrence in Mills and the unanimous decision in Pickett, inconsistencies between the limitation periods afforded to similar claims were found to thwart the states' arguments that the short paternity statutes of limitation were necessary to prevent stale claims.

Such is the case here. Pennsylvania has permitted the determination of paternity without time limit in other, non-support, actions. For instance, the intestacy law, 20 Pa. Cons. Ann. Stat. §2107(c)(3), (Purdon Supp. 1985) allows a court disposing of a decedent's estate to establish that a child born out of wedlock is the child of his father "if there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity." There is no set number of years after which Pennsylvania considers the evidence too

stale or the likelihood of fraudulent claims too great to allow a court to determine parentage under this heirship statute.

Secondly, a father in Pennsylvania may obtain a judicial determination that he is a child's parent without any limit to the time in which he seeks this determination. In In Re Mengel, 287 Pa. Super. 186, 429 A.2d 1162 (1981), the Pennsylvania Superior Court determined that a person claiming to be a father could utilize the Declaratory Judgment Act to seek such a determination and could as part of this suit obtain blood tests under the Uniform Act on Blood Tests to Determine Paternity. In passing, the Mengel court additionally noted that the father could also raise the issue of paternity in a suit to obtain visitation rights or to amend the child's birth certificate,[4] 429 A.2d at 1167. Moreover, under the holding of Commonwealth v. Goldman, 199 Pa. Super. 224, 184 A.2d 351 (1962), a father

[4] In Commonwealth ex rel. Gonzales v. Andreas, 245 Pa. Super. 307, 369 A.2d 416 (1976), the Superior Court specifically criticized the Uniform Act on Blood Tests to Determine Paternity (28 Pa. Stat. §307) because it "does not make any provision for a particular prescriptive period in which a putative father denying paternity must commence suit," 369 A.2d at 419. When 28 Pa. Stat. §307 was refashioned at 42 Pa. Stat. §6131 et seq., it is notable that the legislature once again refused to set a limit on the period of time in which a court could order the blood tests to determine parentage.

has the right at any time to dispute parentage and to have the benefit of blood tests to do so, provided he is not barred by laches or estoppel.

There never has been any statute of limitations in Pennsylvania which pertains to these actions. Yet these actions necessarily involve and decide paternity questions which may possibly arise more than six years after the birth of the subject child. Just as in Mills and Pickett, this inconsistency undercuts the State's position that proof problems are too great to determine paternity more than six years after the birth of the child. No justification has been put forward for this inconsistent application, which could explain why the evidence is considered stale after six years in one case but not in another.

Finally, in upholding Section 6704(e) the Pennsylvania Supreme Court has ignored the great improvements in the accuracy of blood tests. Pennsylvania statute provides that blood tests can be conclusive as to paternity, 42 Pa. Cons. Stat. Ann. §6136 (exclusion only). In addition, Pennsylvania case law permits these tests to be used as some positive evidence of paternity, though not conclusive. Turek v. Hardy, 312 Pa. Super. 158, 458 A.2d 562 (1983).

In Pickett v. Brown, supra, this Court concluded:

> In Mills, the court rejected the argument that recent advances in blood testing negated the state's interest in avoiding the prosecution of stale or fraudulent paternity claims. 456 U.S. at 98, n. 4, 102 S.Ct. at 1554, n.4. It is not inconsistent with this view, however, to suggest that advances in blood testing render more attenuated the relationship between a statute of limitations and the State's interest in preventing the prosecution of stale or fraudulent paternity claims. This is an appropriate consideration in determining whether a period of limitations governing paternity actions brought on behalf of illegitimate children is substantially related to a legitimate state interest.
>
> Pickett v. Brown, supra, 462 U.S. at 17.

In sum, the State's position that Section 6704(e) bears a substantial relationship to the stated purpose of preventing stale or fraudulent claims is thoroughly undercut by the inconsistencies in permitting paternity determinations without time limits in non-support proceedings, while barring actions which come under Section 6704(e), and further diminished by the availability of highly accurate blood tests. Moreover, the State's important countervailing interest cited in the Mills concurrence and reiterated in Pickett of gaining support for children to keep them off the

welfare rolls further weakens the State's justification for upholding Section 6704(e) and therefore denying paternal support to many children.

In sum, the above considerations weigh heavily against the argument that Section 6704(e) has a substantial relation to a legitimate state interest of avoiding fraudulent or stale claims. The Clark court's holding that the statute does not violate equal protection should be reversed.

II. Due Process

In addition to its equal protection infirmity, Pennsylvania's six-year statute of limitations deprives minor children such as Tiffany Clark of their rights to seek and obtain the paternal financial support to which they are entitled without first affording them any of the due process protections mandated by the Fourteenth Amendment.

Pennsylvania's well-settled statutory and common law establishes that the minor children of Pennsylvania born both in and out of wedlock are owed an ongoing duty of support from their parents, throughout their minority, Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974); Commonwealth v. Rebovich, 267 Pa. Super. 254, 406 A.2d 791 (1977). Despite the child's legal entitlement to receive this paternal financial support for eighteen years, however, 42 Pa. Cons. Stat. Ann. §6704(e) (Purdon Supp. 1985) provides that the legal action to obtain it from the father must be commenced within six years of the birth of the out of wedlock child, or within two years of the putative father's last voluntary support. Moreover, Pennsylvania law requires that such lawsuit must be initiated, not by the minor child, but by the person having custody of the child. 42 Pa. Cons. Stat. Ann. §6704(b) (Purdon Supp. 1985); Pa.R.Civ.P. 1910.3, 1910.4.

Thus, although a minor child born out of wedlock possesses an independent right to paternal support, the child's custodian possesses the exclusive control to exercise or not exercise the child's right to seek such support. Consequently, in cases such as that now before this Honorable Court, the custodial parent's failure to initiate a support action within the time prescribed by the challenged statute of limitations serves forever to foreclose the minor child's right to receive the support which her parent is legally obligated to provide.

The Pennsylvania Superior Court's rejection of the Petitioner's due process challenge to the constitutionality of 42 Pa. Cons. Stat. Ann. §6704(e) (Purdon Supp. 1985), conflicts with the conclusions of the courts of many other jurisdictions. Numerous states have recognized that a minor child's independent rights to obtain parental support may not, under the Due Process Clause, be constitutionally foreclosed by a statute of limitations which truncates the custodial parent's right to initiate such a support action on behalf of the child.

In some jurisdictions, the minor child has been held to possess a right of action separate from, and longer than, that afforded to the child's parents -- precisely to avoid the due process problems raised in the instant case. See Spada v. Pauley, 149 Mich. App. 196, 385 N.W.2d 746

(1986); Bertie-Hertford Child Support Agency ex rel. Souza, (Court of Appeals, N.C.) 342 S.E.2d 579 (1986); Payne v. Prince George's County Dept. of Social Services 67 Md. Ap. 327, 507 A.2d 641 (1986); Nettles v. Beckley, 32 Wash. App. 606, 648 P.2d 508 (1982); Stringer v. Dudoich, 92 N.M. 98, 583 P.2d 462 (1978); Kaur v. Singh Chawla, 11 Wash. App. 362, 522 P.2d 1198 (1974); Huss v. DeMott, 215 Kan. 450, 524 P.2d 743 (1974).

In other jurisdictions, shorter statutes of limitations have been upheld because they barred only the rights of the adult--not the rights of the minor child--to file suit beyond the statutory limit. See, Doak v. Milbauer, 216 Neb. 331, 343 N.W.2d 751 (1984); Huss v. DeMott, supra., 524 P.2d at 746:

> We do not think the legislature should be regarded as intending to relieve the father from this obligation to the child by the enactment of the statute above referred to, which authorizes the mother of an illegitimate child if she sees fit, to maintain an action for her benefit in the name of the state against the putative father, and provides for the enforcement of a judgment by imprisonment ... It would obviously be inadequate to cover the entire field of paternal liability, since the mother might not care to institute such a proceeding, or might die without instituting it. The measure is one providing machinery for the enforcement of a duty already existing rather than one creating a new obligation. Parental liability for the support of legitimate children did not

> originate with the statute [of limitations] imposing punishment for a default in that respect.

Cf., Ortega v. Portales, 134 Colo. 537, 307 P.2d 196 (1957).

In finding a paternity statute of limitations unconstitutional as violative of a minor child's right to due process, the Texas Court of Civil Appeals stated:

> To hold otherwise would allow the illegitimate's rights to be waived by the mother. Not only would this result in unequal protection under the law...but such a denial would violate the illegitimate's constitutional rights to due process... The law does not permit one to forfeit another's rights. The right to an illegitimate child to assert a claim for paternal support is too fundamental to permit its forfeiture by the mother's failure to timely institute a filiation proceeding.
>
> In Re: Miller, 605 S.W.2d 332 (Tx. Civ. App. 1980), at 336 (emphasis added).

Clearly, Pennsylvania's judicial ratification of the challenged statute of limitations on due process grounds contrasts starkly with the prevailing analyses and holdings of numerous other state courts.

Consequently, the Petitioner respectfully requests this Honorable Court now to consider the due process challenge raised in the instant case, in light of the important and fundamental right involved, and the conflicting case law of other jurisdictions herein cited.

III. Conflict with Federal Statute

The Pennsylvania Superior Court has decided as a matter of first impression that Pennsylvania's newly enacted eighteen-year statute of limitations in paternity/support actions is not retroactive and cannot be applied to revive cases barred under the six-year statute. Pennsylvania's eighteen-year statute thus construed by the Superior Court is in direct conflict with the controlling federal statute.

In 1984 Congress unanimously passed the Child Support Enforcement Amendments of 1984, P.L. 98-378, codified at 42 U.S.C. §§651, et seq. These Amendments require states participating in the Program for Aid to Families of Dependent Children (AFDC), Title IV, Part A of the Social Security Act, 42 U.S.C. §602-615 (1982) to adopt certain procedures to strengthen and streamline support collection efforts.

The eighteen-year statute of limitations in support/paternity actions was a keystone of this program and each state was required to adopt it in order to share in the federal funding for state support programs:

> 42 U.S.C. §666. Requirement of statutorily prescribed procedures to improve the effectiveness of child support enforcement

a) Types of procedures required:

> In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with the regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:
>
> ...
>
> (5) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday. (emphasis added)

In his remarks upon the passage of the Child Support Enforcement Amendments, Senator Robert Dole presented the following stark statistics:

> "According to the U.S. Census Bureau, more than 8.4 million women in 1981 were raising children whose fathers were absent; 30 percent of these women and children were living in poverty. Although most of the women should receive child support payments, obligations have been established on behalf of only 4 million of them.
>
> 130 Cong. Record S-4802, April 25, 1984

These figures were reiterated in the comments of other Senators and Representatives. The clear Congressional concern here was for the women and children who in the past had not received support. The Amendments were passed so that in the future these women and children would be deprived of support no longer.

The Pennsylvania Legislature enacted its eighteen-year state of limitations, 23 Pa. Cons. Stat. Ann. §4343(b) (Purdon Supp. 1987) while Cherlyn Clark's case was pending before the Superior Court. It provides:

> Limitations of Actions. -- An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

Section 4343(b) was part of a package of support program reforms passed to bring Pennsylvania into compliance with the federal Amendments and thereby prevent Pennsylvania from losing federal reimbursement funds provided for the support programs. Thus, a prepared statement by Pennsylvania State Senator Greenleaf which was read into the record at the time the legislature approved Act 66 emphasized that the Act had been passed for "federal money and to better provide for our families." Pennsylvania Legislature Journal-Senate, October 9, 1985, at 1099.

The federal government is free to establish conditions for participation in federally funded programs, King v. Smith, 392 U.S. 309 (1968). In other cases brought under the Social Security Act this Court has held that once a state voluntarily chooses to participate in a program under that Act, the State must comply with the

federal statutory requirements and applicable regulations. See, Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 715 (1985); Harris v. McKae, 448 U.S. 297, 301 (1980).

The plain language, accompanying regulations, and legislative history of Section 466(a)(5) of the Child Support Enforcement Amendments of 1984 require that states adopt, at minimum, retroactive eighteen-year statutes of limitation for paternity actions. The statutory language is clear: any child at any time until his eighteenth birthday must be able to have his paternity established.

The House of Representatives, in approving the Amendments, specifically stated:

> The bill provides that procedures under applicable state paternity laws must permit the establishment of an individual's paternity for any child until the child's eighteenth birthday... States could eliminate statutes of limitation for establishing paternity altogether if they wished. H.S. Rep. No. 527, at 38.(1983).

The Congressional intent to use this requirement to revive cases which might have been barred by shorter statutes in the various states was made clear by the regulations implementing the Child Support Enforcement Amendments on May 9, 1985. In addressing comments that the regulations gave insufficient attention to existing state

laws and procedures for the establishment of paternity, the Department of Health and Human Services (HHS) took the following position:

> Since it is clear that cases previously considered closed because of the child's age will now have to be reopened and services provided, we saw no need to elaborate on this requirement. Child Support Enforcement Program, Implementation of Child Enforcement Amendments of 1984, 50 Fed. Reg. 90, 19608, 19631 (1985), comment to 45 C.F.R. §302.70(a)(5)

HHS' position on this issue is entitled to substantial deference. See, e.g. Connecticut Dept. of Income Maintenance v. Heckler, 471 U.S. 524, 105 S.Ct. 2210, 2214 (1985). Moreover HHS' position is the only reasonable interpretation of the plain language of the Act and legislative history.

Cherlyn Clark and her daughter were among the 4.4 million women and children living without needed support in 1981, whom Congress clearly intended to help by the enactment of the Child Support Enforcement Amendments. Yet by operation of Pennsylvania law, the Amendments will do them no good. Section 4343(b) as construed by the Pennsylvania Superior Court is in direct conflict with the intent and language of the Child Support Enforcement Amendments.

CONCLUSION

For these reasons, the Petitioner respectfully requests this Honorable Court to issue a Writ of Certiorari to review the Decision and Order of the Superior Court of Pennsylvania.

CERTIFICATION IN ACCORDANCE WITH SUPREME COURT RULE 28.4(c)

Because the constitutionality of a state statute is drawn into question, 28 U.S.C. §2403(b) may be applicable.

Respectfully submitted:

Evalynn B. Welling

Eileen D. Yacknin
Attorneys for Petitioner

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CHERLYN CLARK,
Plaintiff

v.

GENE JETER,
Defendant

FAMILY DIVISION
No. FD83-6955
Code _____

OPINION & ORDER OF COURT
JUDGE GENE STRASSBURGER

Counsel for Plaintiff:
Evalynn B. Welling, Esq.

Counsel for Defendant:
Craig A. McClean, Esq.

APPENDIX A

CHERLYN CLARK,)
)
Plaintiff)
)
v.) No. FD83-6955
)
GENE JETER,)
)
Defendant)

O P I N I O N

STRASSBURGER, J.

Plaintiff, Cherlyn Clark [Clark] brought this action seeking child support for her daughter, Tiffany Clark [Tiffany] against Defendant, Gene Jeter [Jeter].

To summarize, in 1971, Clark and Jeter began seeing each other. In September, 1972, Clark discovered she was pregnant and informed Jeter that he was the father. According to Clark, Jeter did not want this child and acted abusively towards her. According to Jeter, he denied that the child was his and engaged with Clark in a heated argument. The relationship between the parties thereafter ceased.

On June 11, 1973, Tiffany was born. One David Green was listed on the birth certificate as the child's father. The same name was given to the Pennsylvania Department of Public Welfare [DPW] when Clark applied for welfare in 1973. In August, 1974 Clark informed DPW that Green was in fact a fictitious name and that the real father was Jeter. Several documents were completed at that time including: an Application for Child Support Services; Authorization to Change Beneficiary and the Pay Order and Arrearages to Commonwealth of Pennsylvania, Department of Public Welfare; Notice of Support Referral; and Child Support Action Notice. However, no support complaint was filed against Jeter until September 22, 1983. Jeter filed an answer and new matter to the complaint which denied paternity and raised the statute of limitations. At 42 Pa. C.S.A. §6704, the statute provides:

> "(b) Limitation of actions -- All actions or proceedings to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action or proceeding may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father."

Although Clark concedes that the action was commenced neither within six years of the child's birth nor within two years of the last reported "support" contribution, she argues that the statute of limitations is unconstitutional in that it treats illegitimate children differently than legitimate children.

However, such an argument cannot prevail in light of Astemborski v. Susmarski, 499 Pa. 99, 451 A.2d 1012 (1982), cert. granted, order vacated and remanded, 103 S.Ct. 3105 (1983), order reinstated, 502 Pa. 409, 466 A.2d 1018 (1983), which upheld the statute in the following words, after the same equal protection challenge:

> "Since the statute is substantially related to a legitimate state interest, viz., the prevention of stale or fraudulent paternity claims, it is not constitutionally infirm under a Fourteenth Amendment challenge even though the statute may operate, as it has in this case, to deprive an illegitimate child of its right to make a claim for support beyond the six year limit."
> 466 A.2d at 1022

As alternative arguments, Clark contends that the statute of limitations should be tolled and/or that Jeter should be estopped to assert the statute due to threats made and duress exercised upon Clark. However, Clark's testimony indicates that any fear she may have had of Jeter, even if sufficient to toll the statute, lasted only a few years after the 1972 incident. There were at least six years after that period during which an action could have been filed.

Based on the facts and applicable law, this court finds that Clark's claim is barred by the statute of limitations. An order in accord with this opinion shall be entered.

STRASSBURGER, J.

July 8, 1985

CHERLYN CLARK,
Plaintiff

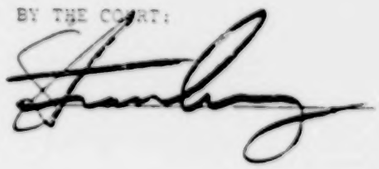
v. No. FD83-6935

GENE JETER,
Defendant

ORDER OF COURT

AND NOW, this 8th day of July, 1985, in accordance with the foregoing opinion, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiff's complaint for support be and the same is dismissed.

BY THE COURT:



J.

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

CHERLYN CLARK,
Appellant

v.

GENE JETER

NO. 1040 Pittsburgh 1985

ORDER

AND NOW, this 23rd day of OCTOBER , 1986, it is ordered as follows:

X Order affirmed.

_____ Order reversed.

_____ Judgment affirmed.

_____ Judgment of Sentence affirmed.

_____ Judgment of Sentence reversed.

_____ Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

_____ Order modified as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa.R.A.P.

_____ Costs to be taxed as provided in opinion filed herewith.

_____ Appeal quashed.

BY THE COURT

Eleanor R Valecko
DEPUTY PROTHONOTARY

APPENDIX B

J. 14060/86

CHERLYN CLARK, Appellant : IN THE SUPERIOR COURT OF PENNSYLVANIA

v. :

GENE JETER : No. 1040 Pittsburgh, 1985

Appeal from the order of the Court of Common Pleas, Family Division, of Allegheny County, Family No. 83-6955.

BEFORE: ROWLEY, WIEAND, and DEL SOLE, JJ.

OPINION OF THE COURT

BY ROWLEY, J.: FILED: OCTOBER 23, 1986

This is an appeal from an order dismissing appellant's complaint for support. Appellant, the natural mother of a child born on June 11, 1973, filed a support action on behalf of the child against appellee, the putative father of the child, in August, 1983, approximately two years and two months after appellee had last provided financial support for the child. Appellee filed an answer and new matter denying paternity and raising the six-year statute of limitations, 42 Pa.C.S. §6704, as a defense. The trial court dismissed the petition because it was barred by the statute of limitations, because case law had held the statute to be constitutional, and because appellee engaged in no activity justifying the tolling of the statute of limitations.

Appellant has appealed from the order dismissing the action and argues: 1) that the trial court erred in concluding that the six year statute of limitations for support/paternity actions brought on behalf of children born out of wedlock does not violate the equal protection and due process clauses of the United States Constitution;[1] and 2) that the trial court erred in refusing to toll the statute of limitations based on appellee's abusive conduct towards appellant.

Following the filing of the appeal, the legislature enacted a new statute of limitations applicable to determinations of paternity relative to an action for support as follows:

> §4343. Paternity.
>
> (b) Limitations of actions.--An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

Act of October 30, 1985, P.L. 66, Subchapter C §4343(b) [to be codified at 23 Pa.C.S. §4343(b)]. Appellant petitioned the Superior Court to remand the case to the trial court prior to the Superior Court's disposition of the aforementioned issues so that the trial court could decide the issue of the retroactivity of the new statute, for if the new statute is to be given retroactive application, then the arguments raised on appeal are moot. Appellant's petition to remand was denied. However, we will address the issue of whether the 18 year statute of limitations should be given retroactive effect.

I.

A.

The Statutory Construction Act of 1972, 1 Pa.C.S. §1926, provides, "No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly." The new 18 year statute of limitations itself makes no provision for retroactive application, but provides only that the act shall take effect in 90 days. 1985 Pa. Legislative Service #4, P.L. 66, §4 p. 106. However, when the legislature wants to make a statute retroactive, it clearly and unambiguously does so. For example, when the legislature amended the act providing for Commonwealth Court jurisdiction, it included a clause stating that the act "shall take effect immediately and shall be retroactive to December 5, 1980."

Section 404(1) of Act 1982, December 20, P.L. 1409, No. 326. Not only does the 18 year statute of limitations for paternity/support actions not include language suggesting that it was intended to be applied retroactively, but there is no legislative history to support retroactive application of the act. Therefore, we hold that the 18 year statute of limitations for paternity/support actions is not to be applied retroactively.

We find support for our conclusion in Maycock v. Gravely Corporation, ___ Pa. Super. ___, 508 A.2d 330 (1986). In Maycock, 42 Pa.C.S. §5533, which tolls the running of the statute of limitations for civil actions during minority, was held not to apply retroactively to a claim which had been barred under the previous statute of limitations in the absence of a clear intention of the legislature for the act to be retroactive. Although not identical to the new paternity/support statute of limitations, the statute of limitations involved in Maycock is similar in several material respects for determining retroactivity. Both statutes greatly expand the period during which a minor's cause of action can be brought; both conspicuously lack any indication that the legislature intended for them to be applied retroactively; and both provide a prospective effective date only. Therefore, just as the statute of limitations in Maycock is not retroactive, so too is the paternity/support statute of limitations not retroactive.

B.

Even if the statute were to be given retroactive effect, however, it could not revive appellant's cause of action and her complaint would still be time barred. Several courts of this Commonwealth have held that a retroactive statute of limitations can

apply only to actions which have not been concluded or barred under the former statute. Upper Montgomery Joint Authority v. Yerk, 1 Pa. Cmwlth. 269, 274 A.2d 212 (1971). If the right to sue under the prior statute of limitations has not expired, then the new statute of limitations can be applied retroactively. In re Condemnation of Real Estate by Carmichaels, 88 Pa. Cmwlth. 541, 490 A.2d 30 (1985), interpreting Seneca v. Yale and Towne Manufacturing Co., 142 Pa. Super. 470, 16 A.2d 754 (1940). However, once the right to sue has expired, no subsequent legislation can revive it. Overmillar v. D.E. Horn and Co., 191 Pa. Super. 562, 159 A.2d 245 (1960).

In the instant case, the child was born in 1973, and the last voluntary support payment for the child from appellee was made in June, 1981, two years and two months prior to the filing of the complaint for support in August, 1983. The statute of limitations applicable when the Complaint was filed required the action to be commenced within six years of the birth of the child or within two years of the last written admission of paternity or voluntary payment of support. 42 Pa.C.S. §6704(e). Thus appellant's cause of action expired in June 1983 when the child was ten years old and two years after appellee's last voluntary support payment. The new 18 year statute of limitations became effective in January, 1986, some two and one-half years after appellant's cause of action expired. Therefore, even retroactive application of the new 18 year statute of limitations would not affect appellant's rights.

II.

Having determined that the new statute of limitations should not be applied retroactively and that even if it were applied retroactively, it would not remove the time bar on appellant's

action, we now address the arguments raised by appellant as to why the six year statute of limitations should not be applied.

> The six year statute of limitations provides:
>
> (e) Limitation of actions.-All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgement by the reputed father.

42 Pa.C.S. §6704(e). This act is included within the general provisions regarding support actions, and it applies only to an action to determine paternity brought pursuant to a support action. Therefore, it applies only to children born out of wedlock who must establish paternity prior to seeking support. It does not directly preclude all children from obtaining support after the six year period has run or after a putative father ceases to make voluntary support payments for two years, but only precludes children born out of wedlock from establishing paternity. However, because establishment of paternity is a prerequisite to a support order, the statute of limitations operates to deny children born out of wedlock the right to seek support long before they reach majority unless the child, through his guardian, has already had his paternity established.

Appellant argues that the six year statute of limitations deprives a child born out of wedlock the equal protection of the laws and therefore is unconstitutional. In Mills v. Habluetzel, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed. 2d 770 (1982), the Supreme Court held that the period during which support suits can be brought on behalf of illegitimate children must be sufficiently long to allow a reasonable opportunity for the claim to be brought and the limitatio

on such suits must be substantially related to the state's interest in avoiding the initiation of stale claims. In Mills, the court found a one year statute of limitations to deny equal protection; in Pickett v. Brown, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed. 2d 372 (1983), the court similarly found that a two year statute of limitations was unconstitutional. In Astemborski v. Susmarski, 502 Pa. 409, 466 A.2d 1018 (1983) the Pennsylania Supreme Court held that in light of Mills and Pickett, the Pennsylvania six year statute of limitations on paternity/support actions for children born out of wedlock did not deny equal protection because six years provided ample opportunity for a support action to be brought after birth-related financial and emotional problems had subsided and because the state's interest in avoiding claims of paternity where the proof of paternity had become stale was substantially related to the six year statute of limitations.

Appellant recognizes that the Pennsylvania Supreme Court has held that the statute does not deny equal protection based upon Mills and Pickett. Appellant also recognizes that the Superior Court cannot overrule a decision of the Pennsylvania Supreme Court. Commonwealth v. Edrington, 317 Pa. Super. 545, 464 A.2d 456 (1983). However, appellant suggests that we should "carefully scrutinize the logic" utilized in Astemborski to uphold the statute.

Appellant argues that a six year statute of limitations in paternity actions is not substantially related to the state's purported interest in precluding paternity actions in which the proof is stale. If the state had a legitimate and substantial interest in precluding paternity claims where the proof other than blood tests was non-existent or dimmed by the passage of time, then, appellant argues, the state would consistently place time limitations on all

paternity determinations. However, the state has not done this. For example, the Probate, Estates and Fiduciaries Code includes no limitations on the time in which a child must establish paternity in order to inherit from the putative father. 20 Pa.C.S. 2107(c)(3). Thus, the state does not have a legitimate and substantial interest in limiting the time in which paternity actions for support must be brought, and the Pennsylvania statute does not satisfy the second requirement of Mills.

Further authority for this position is found in State ex rel Adult and Family Services v. Bradley, 295 Or. 216, 666 P.2d 249 (1983). In this case, the Supreme Court of Oregon held unconstitutional on equal protection grounds a six year statute of limitations on paternity actions for out-of-wedlock children. The court stated that the equal protection clause requires at a minimum that states refrain from totally precluding illegitimate children from exercising their rights for reasons of proof problems alone. Jimenez v. Weinberger, 417 U.S. 628, 94 S.Ct. 2496, 41 L.E.2d 363 (1974); Mathews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976); see also Bradley, Id., at 253, n. 12. Therefore, any restraints on the rights of children born out of wedlock to establish paternity must relate specifically to problems of proof in establishing paternity. The court examined the Oregon statutes and found that the proof problem had been addressed by the provisions regarding the use of blood tests (O.R.S. 109.258) and by the requirement of evidence of paternity corroborating the mother's testimony. (O.R.S. 109.145). The court stated that "although proof of paternity in some cases may become difficult with the passage of time, that possibility does not condone the total preclusion of illegitimate children beyond a certain age from attempting to [illegible] father's identity." Bradley, Id., at 254. Thus the

court held that the six year statute of limitations denied equal protection, especially where a child could bring a paternity action up to ten years after the death of a parent to determine his right to inherit from the deceased putative father.

In Asterborski, the Pennsylvania Supreme Court did not consider that proof of paternity problems have been addressed by other Pennsylvania statutes such as 42 Pa.C.S. §6136 which provides that blood tests can be conclusive as to paternity,[2] nor that the legislature has already expressed a lack of state interest in proof problems in paternity actions by placing no limitation on when a child must establish paternity in order to inherit by intestate succession. Similarly the court did not address the seeming inconsistency of limiting out of wedlock children's rights to support by allowing them to establish paternity only within six years of the date of birth or within two years of the last voluntary support payment, but to place no limitation on the putative parent's right to establish paternity at any time and thereafter seek enforcement of his parental rights. See: In re Mengel, 287 Pa. Super. 186, 429 A.2d 1162 (1981) (unwed putative father has standing to estabish paternity through a petition for declaratory judgment.) Despite the logic of these considerations and their acceptance in developing case law, the Pennsylvania Supreme Court has thus far remained steadfast in its holding that the six year statute of limitations is constitutional. As an intermediate appellate court, we are bound by the decisions of the Supreme Court. Therefore, we hold that the six year statute of limitations, 42 Pa.C.S. §6704(e), does not deny equal protection.

III.

Appellant also argues that the six year statute of limitations denies due process of law. Even though a child has a right to support throughout his minority, a child born out of wedlock can only sue to receive the support to which he is entitled by bringing an action within six years of birth or two years of the putative father's last voluntary support. Moreover, the statute, which limits when the action must be brought, requires that the complaint for support of a minor child be brought by the person having custody of the child. 20 Pa.C.S. §6704(b). Thus, although it is the child's right to support, the child's custodian has exclusive control to exercise or not to exercise the child's right. By failing to commence an action for the child's support within the statute of limitations, the custodian can forfeit the child's right to ever receive support from the putative father. Therefore, appellant argues, the child is denied due process.

In some jurisdictions which have considered the due process argument against paternity statutes of limitations, the controlling issue has been whether the statute precludes the child's only avenue for enforcement of the parent's obligation for support. In some jurisdictions, the statutory procedure for obtaining support, to which the statute of limitations applies, is not the exclusive means of establishing paternity and support. Kaur v. Singh Chawla, 11 Wash. App. 362, 522 P.2d 1198 (1974) (to keep the statute of limitations from being declared unconstitutional, the court held that the statutory filiation procedures were not the exclusive means of securing the child's right to support); Huss v. DeMott, 215 Kan. 456, 524 P.2d 743 (1974) (a child has a common law cause of action separate from the statutory bastardy proceedings). And in some jurisdictions, the statute of limitations has been interpreted as

applying only to the mother or guardian's right and not to the child's right. Doak v. Milbaurer, 216 Neb. 331, 343 N.W.2d 751 (1984); Huss v. DeMott, 215 Kan. 450, 524 P.2d 743 (1974).

The only procedure for bringing a paternity and support action in Pennsylvania is pursuant to the support statute. 42 Pa.C.S. §6701 et seq. Yet under this statute, the child's custodian must bring the action and must do so while the child is still a minor. If the person who has custody of the child fails to file a complaint for support/paternity before the child is six years old, the child is foreclosed from seeking and obtaining support throughout the remainder of his minority even though, in theory, he has the right to support until he reaches majority.

It is the settled rule in Pennsylvania, "that it is not violative of any constitutional rights to hold minors bound equally with adults to the prescribed statutory periods within which legal causes of action may be brought." Petri v. Smith, 307 Pa. Super. 261, 453 A.2d 342 (1982); Von Colln v. Pennsylvania Railroad Co., 367 Pa. 232, 80 A.2d 83 (1951). In DeSantis v. Yaw, 290 Pa. Super. 535, 434 A.2d 1273 (1981) a panel of the Superior Court seriously questioned the continuing validity of the Supreme Court's rule stating: "a chose in action is a form of personal property that without question now belongs to the injured child himself, and yet he is legally debarred from pursuing his claim." Id., at 542, 434 A.2d at 1276. The Supreme Court has not re-addressed the issue of whether children who are held to be equally bound to statutes of limitations with adults are denied due process, and the Superior Court has been compelled to continue to follow the long-established rule. Stein v.

The Washington Hospital, 302 Pa. Super. 124, 448 A.2d 558 (1982). Until the Supreme Court changes its rule, we are bound to follow it. Therefore, we hold that the six year statute of limitations, 42 Pa.C.S. §6704(e), does not deny due process.

IV.

Appellant's final argument is that appellee should be equitably estopped from raising the statute of limitations as a defense because of his conduct towards her. Appellant avers that when she told appellee that she was pregnant with his child, he physically abused her and threatened her in order to prevent her from listing him as the child's father on the birth certificate. As found by the trial court, however, even if appellee did threaten and abuse appellant, this behavior lasted only a few years after 1972, and there were at least six years in which to have commenced the action after the abuse ceased. Therefore, we find no merit to this argument.

Order affirmed.

---

1. Appellant has provided no notice to the Attorney General of her constitutional challenge to the statute in violation of Pa.R.C.P. 235 and Pa.R.A.P. 512.

2. Case law holds that blood tests are admissible as some evidence of paternity but are not conclusive. Olson v. Dietz, ___ Pa. Super. ___, 500 A.2d 125 (1985); Connell v. Connell, 329 Pa. Super. 1, 477 A.2d 872 (1984); Turek v. Hardy, 312 Pa. Super. 158, 458 A.2d 562 (1983).

The Superior Court of Pennsylvania
Sitting at Pittsburgh

DAVID A. SZEWCZAK
PROTHONOTARY
ELEANOR R. VALECKO
DEPUTY PROTHONOTARY

1015 GRANT BUILDING
PITTSBURGH, PA
15219
(412) 565-7592

December 18, 1986

Evalynn B. Welling, Esquire
Eileen D. Yacknin, Esquire
Neighborhood Legal Services
1312 East Carson Street
Pittsburgh, PA 15203

In Re: Clark v. Jeter
No. 1040 Pittsburgh, 1986

Dear Ms. Welling & Ms. Yacknin:

The Court has entered the following Order on your Application For Reargument in the above-captioned matter:

"ORDER OF COURT

AND NOW, this 18th day of December, 1986, Appellant's Application for Reargument is denied.

Per Curiam"

Very truly yours,

Eleanor R. Valecko

DEPUTY PROTHONOTARY

ERV:bbc

cc: Craig A. McLean, Esquire
Honorable Eugene B. Strassburger, III

APPENDIX C

The Supreme Court of Pennsylvania
Western District

PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 City-County Building
Pittsburgh, PA
15219
(412) 565-2816

May 27, 1987

Evalynn B. Welling, Esquire
Eileen D. Yacknin, Esquire
Neighborhood Legal Services
1312 E. Carson St.
Pittsburgh, Pa. 15203

In Re: Cherlyn Clark v. Gene Jeter
No. 43 W. D. Allocatur Docket 1987

Dear Mses. Welling and Yacknin:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above matter:

"May 27, 1987
Petition Denied.
Per Curiam"

Very truly yours,

Irma T. Gardner

DEPUTY PROTHONOTARY

ITG:cho
cc: Craig McKlean, Esq.
Hon. Leroy S. Zimmerman
Rose Palmer-Phelps, Director
Hon. Eugene Strassburger

APPENDIX D

No. 87-5565

IN THE SUPREME COURT OF THE UNITED STATES
TERM,

CHERLYN CLARK,

Petitioner

vs.

GENE JETER,

Respondent

ON WRIT OF CERTIORARI FROM THE DECISION
OF THE SUPERIOR COURT OF PENNSYLVANIA

CERTIFICATE OF SERVICE

I, Eileen D. Yacknin, hereby certify that, on the date designated below, I served a Petition for a Writ of Certiorari in the above-captioned case onto the Respondent and, pursuant to Supreme Court Rule 28.4(c), onto the Attorney General of Pennsylvania, by mailing one copy of the same (pursuant to Supreme Court Rule 28.3) to the following persons at the following locations, by first class mail, postage prepaid:

Counsel of Record for Respondent:

Attorney Craig McClean
1111 Manor Building
Pittsburgh, PA 15219

Attorney General of the
Commonwealth of Pennsylvania

Attorney Leroy Zimmerman
1545 Strawberry Square
Harrisburg, PA 17120

Dated: September 24, 1987

Eileen D. Yacknin
Counsel for Petitioner

OPPOSITION

BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NO. 87-5565

CHERLYN CLARK,
Petitioner
v.
GENE JETER,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE SUPERIOR COURT OF PENNSYLVANIA

WENDELL G. FREELAND,
Counsel of record
CRAIG A. McCLEAN
Freeland and Kronz
1111 Manor Building
Pittsburgh, Pennsylvania 15219

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TABLE OF AUTHORITIES

REGULATIONS

QUESTIONS PRESENTED

1. Should This Court grant certiorari in a case of no precedential value where Petitioner's action had been time-barred under either the now repealed six-year statute of limitations or the subsequent eighteen-year statute of limitations retroactively applied?

2. Should This Court grant certiorari where petitioner is questioning the constitutionality of a defunct and repealed statute which had properly been determined by the highest court of the Commonwealth of Pennsylvania to not be violative of the equal protection and due process guarantees of the Fourteenth Amendment of the United States Constitution?

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CHERLYN CLARK,

Petitioner

vs. No. 87-5565

GENE JETER,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE SUPERIOR COURT OF PENNSYLVANIA

Respondent, Gene Jeter, prays that Petitioner's request for a Writ of Certiorari be denied.

COUNTER STATEMENT OF THE CASE

Tiffany Clark was born to Cherlyn Clark on or about June 11, 1973. David Green, and not Gene Jeter, was listed by Cherlyn Clark as the father on the baby's birth certificate. Ten years

and two months later, in August of 1983, Cherlyn Clark filed a support action against Gene Jeter, alleging him to be the father of Tiffany Clark. Gene Jeter denied that he is the father; and, in defense, further asserted the applicable statute of limitations. The child is now 14 years old.

Despite petitioner's recitations to the contrary, there are no blood test results in the record and the trial court did not find that Gene Jeter had supported the subject child.

The Court of Common Pleas of Allegheny County found, based on the facts of this case, that Cherlyn Clark's claim was barred by the statute of limitations and dismissed her Complaint. Cherlyn Clark's subsequent appeal to the Superior Court was denied. Cherlyn Clark's subsequent Application for

Permission to file an Application for Remand was denied. Cherlyn Clark's subsequent Application for Reargument was denied. The Supreme Court of the Commonwealth of Pennsylvania denied her Application for Permission to File an Appeal.

REASONS FOR DENYING THE PETITION

This Respondent is one of the few people caught between a prior statute of limitations and an expanded statute of longer duration. Therefore, a review of this case is of little importance to most.

The Superior Court of the Commonwealth of Pennsylvania found that Gene Jeter was entitled to have the action against him brought to a conclusion. Although the court did address the issue of retroactivity of Pennsylvania's eighteen-year statute, that inquiry was

not determinative. Cherlyn Clark's action was time-barred in any event. Her complaint for support was dismissed on July 8, 1985 . . . some eight months prior to the effective date of the eighteen-year statute of limitations. It would, therefore, seem that Petitioner's brush sweeps too braodly in requesting Certiorari. Limited to the facts and circumstances of the instant matter, any decision would be of little, if any, precedential value.

Petitioner's reliance upon the position of the Department of Health and Human Services is misplaced. The comment cited relates solely to the mechanism of the establishment of paternity and not to actions already time-barred or judicially concluded. See, Child Support Enforcement Program, Implementation

of Child Enforcement Amendments of 1984, 50 Fed. Reg. 90, 19608, 19631 (1985), comment to 45 C.F.R. Section 302.70(a)(5). Indeed, if any legislature or court would seek to impose an expanded statute of limitations upon a defendant who had successfully raised the bar of time, there would necessarily be a constitutional inquiry. The priviledge to raise a statute of limitation is a vested right constitutionally protected by the Fourteenth Amendment to the Federal Constitution. ELECTRICAL WORKERS V. ROBBINS AND MYERS, INC., 429 U.S. 229 (1976); CHASE SECURITIES CORP. V. DONALDSON, 325 U.S. 304 (1945); CAMPBELL V. HOLT, 115 U.S. 620 (1885). Petitioner would have This Court revisit the constitutional arguments continually raised for the last nineteen years in

these statute of limitation cases. Yet, the Commonwealth of Pennsylvania has met these arguments with contempative consideration. ASTEMBORSKI V. SUSMARSKI, 502 Pa. 409, 466 A.2d 1018 (1983); PETRI V. SMITH, 307 Pa. Super. 261, 453 A.2d 342 (1982); VON COLLN V. PENNSYLVANIA RAILROAD CO., 367 Pa. 232, 80 A. 2d 83 (1951). It would now serve no purpose to require that we examine the constitutionality of a defunct and repealed statute.

The thing is done. It was a political question which required a legislative response. The Congress of the United States spoke; and, the Pennsylvania Legislature responded. It is over. Let the matter rest.

CONCLUSION

For these reasons, Respondent respectfully requests that Petitioner's prayer for a Writ of Certiorari be denied.

Respectfully submitted,

Wendell G. Freeland

Wendell G. Freeland, Counsel for RESPONDENT

Craig R. McClean, Additional Counsel.

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No. 87-5565

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CHERLYN CLARK,
Petitioner,
v.
GENE JETER,
Respondent.

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF THE PETITION

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IN THE

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On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF THE PETITION

The Women's Legal Defense Fund ("WLDF") respectfully moves, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief as amicus curiae. The consent of counsel for the Petitioner has been obtained. Counsel for Respondent has refused consent.

WLDF is a tax-exempt organization which represents men and women challenging barriers to sexual equality. Because of the high rate of poverty among single women and their children, WLDF is particularly concerned with legal issues relating to, and engages in educational and other public projects designed to promote and protect, the rights of such individuals. WLDF regularly repre-

sents the interests of single women and their children, among others, before the courts and the United States Congress. Such representation constitutes an important aspect of WLDF's activities and includes participation as amicus curiae in significant cases before this Court.

The decision below—that a six-year statute of limitation which restricts an individual's ability to establish paternity in child-support actions is both constitutional and legally viable, despite the recent enactment of a federally-mandated eighteen-year limitation period for such actions—raises grave concerns for the individuals whom WLDF represents. That decision significantly limits the already substantial number of non-marital children, or their mothers, who may bring paternity suits against absent fathers and, as a result, obtain the necessary support to which they are entitled. Indeed, according to U.S. Census Bureau figures, over 1.6 million of the more than two million never-married mothers heading single parent families as of the spring of 1986 had not been awarded child support payments from absent fathers. *See* Bureau of Census, U.S. Department of Commerce, *Child Support and Alimony: 1985, Current Population Reports*, Series P-23, No. 152, at 2-3 (Tables B and C). At least 85,000 of such women could not obtain a child support order because they were unable to establish paternity. *Id.* at 12 (Table 2). The decision below can only exacerbate this unconstitutional deprivation.

Thus, the overall effect of the decision below is to force mothers to bear a disproportionate share—or in some cases all—of the child support obligations imposed on both parents by state law. The decision below, if it stands, will predictably promote, rather than thwart, the feminization of poverty and, concurrently, increase public welfare burdens. Necessarily, the ramifications of this case, both within and outside Pennsylvania, will directly affect WLDF's constituency. It is for this reason that WLDF requests permission to submit this brief.

WHEREFORE, WLDF respectfully requests that its Motion be granted.

Respectfully submitted,

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October 1987

QUESTIONS PRESENTED

1. Does a six-year statute of limitation for actions brought to establish paternity in support actions for children born out of wedlock violate the equal protection guarantee of the Fourteenth Amendment of the United States Constitution?

2. Is Pennsylvania's current eighteen-year paternity statute of limitation, which has been construed to be not retroactive to cases pending on appeal or previously barred by the now repealed six-year statute, inconsistent with the language and intent of the federal Child Support Enforcement Amendments?

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IN THE

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BRIEF AMICUS CURIAE FOR THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

The interest of the Amicus is stated in the Motion for Leave to File, to which this brief is attached.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

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[1] The Amicus adopts the Statement of the Case set forth in the Petition.

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 6704(e) of Title 42 of the Pennsylvania statutes provides:

> (e) *Limitation of actions.*—All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father.

42 Pa. Cons. Stat. Ann. § 6704(e) (Purdon 1982), (*repealed by* Act of Oct. 30, 1985, Pub. L. 264, No. 66 § 3 (Purdon Supp. 1987).

Section 4343(b) of Title 23 of the Pennsylvania statutes provides:

> (b) *Limitation of actions.*—An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

23 Pa. Cons. Stat. Ann. § 4343(b) (Purdon Supp. 1987).

REASONS FOR GRANTING THE WRIT

I. State Courts' Disparate Treatment of Equal Protection Claims Involving State Paternity Statutes of Limitation Can Only Be Resolved By This Court.

This case presents a critical issue of constitutional proportions: whether a state statute, which imposes a six-year statute of limitation on actions brought on behalf of children born out of wedlock to establish paternity for purposes of support, violates the equal protection clause of the Fourteenth Amendment. Not without reservations, the court below concluded that it does not. *Clark v. Jeter*, 358 Pa. Super. 550, 518 A.2d 276 (1986), *appeal denied*, 527 A.2d 533 (1987). That decision exemplifies the confusion among state courts concerning this important issue.

In recent years, this Court has twice recognized the important equal protection issues raised by paternity statutes of limitation. In *Mills v. Habluetzel*, 456 U.S. 91 (1982), and *Pickett v. Brown*, 462 U.S. 1 (1983), the Court struck down one- and two-year statutes of limitation governing child support-related paternity actions. It did so because, notwithstanding state interests in preventing stale and fraudulent claims, such restrictive statutes provide an inadequate opportunity to file a paternity claim. Whether "longer periods of limitation for paternity suits also may be unconstitutional" because they, too, fail to meet the reasonable opportunity test was recognized, but left open. *Mills v. Habluetzel*, 456 U.S. at 106 (O'Connor, J. concurring).[2]

Moreover, state courts confronted with the constitutionality of longer limitation periods for establishing paternity have reached widely varying results. While

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[2] Indeed, this Court has previously noted probable jurisdiction to review the claim that Pennsylvania's six-year statute of limitation in paternity actions violates the equal protection clause. *Paulussen v. Herion*, 334 Pa. Super. 585, 483 A.2d 892 (1984), *prob. juris. noted*, 474 U.S. 899 (1985). When Pennsylvania enacted its current 18-year statute of limitation in October 1985, the Court vacated the judgment in *Paulussen* and remanded the case for determination whether the 18-year statute would be applied to pending cases that had been barred under the six-year statute. *Paulussen v. Herion*, 457 U.S. 557 (1986). On remand, the Pennsylvania Superior Court found that the statute should not be retroactively applied (359 Pa. Super. 520, 519 A.2d 473 (1986)); this determination is currently being challenged in a related proceeding and an extension of time until December 17, 1981 was recently granted for the submission of an appeal to this Court. No. A-279 (U.S. Oct. 7, 1987) (Brennan, J.).

Pennsylvania has upheld a six-year limitation period,[3] Oregon has found a six-year period to be insufficient to satisfy equal protection concerns.[4] Similarly conflicting results have been reached by a number of other states with respect to the constitutionality of five-year limitation periods,[5] while three- and four-year periods have generally been found constitutionally infirm.[6]

This patchwork of holdings—including that of the court below—cannot be reconciled with the equal protection standards articulated in *Pickett* and *Mills*. Those decisions establish that state statutory restrictions on paternity actions brought on behalf of children born out of wedlock can survive equal protection scrutiny only if:

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[3] *Astemborski v. Susmarski*, 502 Pa. 409, 466 A.2d 1018 (1983).

[4] *State ex rel. Adult & Family Services Div. v. Bradley*, 58 Or. App. 663, 650 P.2d 91 (1982), *aff'd*, 295 Or. 216, 666 P.2d 249 (1983). In finding that criminal non-support actions must also be brought within six years, Massachusetts courts have questioned whether a similar limitation period on the adjudication of paternity claims "could pass muster on equal protection grounds." *Commonwealth v. Gruttner*, 385 Mass. 474, 432 N.E.2d 518, 521 n.3 (1982).

[5] The courts of Alabama and New York have split over the constitutionality of a five-year statute. *Compare Morgan County Dept. of Pensions ex rel. Ryan v. Kelso*, 460 So. 2d 1333 (Ala. Civ. App. 1984) (upholding five-year limitation period) *with Patricia R. v. Peter W.*, 120 Misc. 2d 986, 466 N.Y.S.2d 994 (N.Y. Fam. Ct. 1983) (striking down five-year statute).

[6] *See, e.g., Alexander v. Commonwealth*, 708 S.W.2d 102 (Ky. Ct. App. 1986) (striking down four-year statute); *State Dept. of Health v. West*, 378 So. 2d 1220 (Fla. 1979) (same); *Smith v. Cornelius*, 665 S.W.2d 182 (Tex. Ct. App. 1984) (same); *Moore v. McNamara*, 40 Conn. Supp. 6, 478 A.2d 634 (1984) (striking down three-year statute); *Young v. Board of Education*, 661 S.W.2d 787 (Ky. Ct. App. 1983) (same); *State Dept. of Revenue v. Wilson*, 634 P.2d 172 (Mont. 1981) (same); *Lenoir ex rel. Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E.2d 816 (1980) (same); *Callison v. Callison*, 687 P.2d 106 (Okla. 1984) (same); *State ex rel. S.M.B. v. D.A.P.*, 168 W. Va. 455, 284 S.E.2d 912 (1981) (same).

1. The period for obtaining support granted by the state to non-marital children is sufficiently long to provide those wth an interest in such children a reasonable opportunity to file suit; and
2. The time limitation placed on that opportunity is substantially related to the state's interest in preventing the litigation of stale and fraudulent claims.[7]

While purporting to apply these standards, none of the state courts which have addressed the constitutionality of these limitation periods—including the court below—articulates a reasoned basis for distinguishing the five- to six-year limitation periods (which have received mixed constitutional reviews) from the one- to four-year periods found plainly insufficient to pass constitutional muster.

The one thing these decisions make clear is the need for review by this Court. Only this Court can rectify the incorrect application of its equal protection standards by the court below and effectively resolve the confusion among the state courts. Given the important federal interest associated with child support-related paternity actions, this issue should be resolved by this Court.

II. The Decision Below That The State's Eighteen-Year Statute of Limitation For Paternity Actions Should Not Be Retroactively Applied Is Inconsistent With The Federal Child Support Enforcement Amendments And With The Policies Underlying Those Amendments.

In determining that the newly-enacted and federally-mandated eighteen-year state statute of limitation for paternity actions does not apply retroactively, the court below failed to recognize the essential link between the new limitation period and the Child Support Enforcement Amendments of 1984 ("the Amendments"), 42 U.S.C.

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[7] *Pickett v. Brown*, 462 U.S. at 12-13.

§§ 651-667 (Supp. III 1985). It therefore ignored the intent of and policies underlying the Amendments and, in so doing, misconstrued the state statute. Because the decision below is inconsistent with, and severely undermines the goals of, the Amendments, the Court should review it.

Congress unanimously enacted the Amendments to improve the effectiveness of already existing child support programs. The Amendments require that, to remain in compliance with the child support enforcement program, and specifically the program for Aid to Families with Dependent Children ("AFDC"), Title VI, Part A of the Social Security Act, 42 U.S.C. §§ 601-673 (1982), each state must adopt "[p]rocedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday." 42 U.S.C. § 666(a)(5) (Supp. III 1985). By its plain language, this provision requires states to permit paternity actions at *any* time before a child reaches age eighteen. It provides no exclusion for claims which would already have been barred by lesser statutes of limitation.

That Congress intended to permit the filing of claims of all children less than eighteen years of age—regardless of whether a state's existing limitation period barred that claim—is further demonstrated by the legislative history of the Amendments. That history reflects Congress' great concern over the growing number of single women raising children and an intent to develop appropriate procedures so that all children can obtain needed parental support. For example, Senator Dole, echoing the concerns of a number of his Senate and House colleagues, noted:

> Every year the parents of 1.2 million children are divorced and another 700,000 children are born out of wedlock. Incredibly, half of the children born this year [1984] are expected to live in single parent families before the age of 18. This disturbing trend has led to a rapid increase in the number of child support and paternity cases . . . .

130 Cong. Rec. S4802 (April 25, 1984). Similarly, Senator Bradley pointed out that the number of single parent families increased 100 percent between 1970 and 1980, and that women headed ninety percent of these families. 130 Cong. Rec. S4811 (April 25, 1984).[8] Congress recognized that many of these women and children were already, or would eventually become, public charges unless it enacted effective legislation to compel parents, especially fathers, to meet their support obligations.[9]

Restrictive state statutes of limitation in paternity actions were stumbling blocks to such effective legislation. As the House Ways and Means Committee Report noted,

> [I]f a state's applicable statute of limitations does not permit establishment of paternity past the child's second, sixth or other birthday, it will be impossible ever to establish support orders on behalf of children past these ages and therefore impossible to obtain support for them.

H.R. Rep. No. 527, 98th Cong., 1st Sess. at 38 (1983). By requiring state compliance with an eighteen-year statute of limitation, Congress intended to "assure that *all* children in the United States who are in need of

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[8] *See also id.* at S4811 (April 25, 1984) (statement of Sen. Bradley); *id.* at S9586 (August 1, 1984) (Sen. Durenberger); *id.* at S4812 (April 25, 1984) (Sen. Trible); 130 Cong. Rec. H9974 (Nov. 16, 1983) (Rep. Conable); *id.* at H9980 (Rep. Mikulski).

[9] Senator Moynihan noted the growing number of single parent families headed by women, 52 percent of whom had incomes below the poverty line. The Senator concluded that lack of child support from the absent parent was the "compelling explanation" for this phenomenon. 130 Cong. Rec. S4808 (April 25, 1984); *id.* at S4811 (Sen. Bradley). Senator Hawkins expressed concern over the social costs implicit in these numbers: 80 percent of families seeking AFDC support did so as a result of insufficient support from an absent parent. *Id.* at S4812.

assistance in securing financial support from their parents will receive such assistance." 130 Cong. Rec. H9974 (Nov. 16, 1984) (statement of Rep. Rostenkowski) (emphasis added).

Indeed, the intent of Congress to provide relief to all children, without restriction, was so evident that the Department of Health and Human Services, in adopting federal regulations implementing the Amendments, stated that elaboration on the eighteen-year statute requirement was not necessary "[s]ince it is clear that cases previously considered to be closed because of the child's age will now have to be reopened and services provided." 50 Fed. Reg. 19,608, 19,631 (1985).

Clearly, in enacting the Amendments, Congress meant to remedy a national problem of major proportions. According to the U.S. Census Bureau, of the more than two million mothers of non-marital children as of the spring of 1986, only 370,000 were actually awarded child support payments.[10] Significantly, 85,000 such women could not receive a child support order because they were unable to establish the paternity of their children.[11] Moreover, in 1985, of the over one million unmarried mothers with children below the poverty line, over 950,000 of these women received no child support.[12]

Because Pennsylvania's new statute of limitation was enacted specifically to bring the state into compliance with the Amendments, it must be interpreted consistently with those Amendments. But it has not been. Rather, in refusing to apply Pennsylvania's new eighteen-year statute retroactively, the court below has thwarted clear Congressional intent to make obtaining child support

[10] Bureau of the Census, U.S. Dept. of Commerce, *Child Support and Alimony: 1985, Current Population Reports*, Series P-23, No. 152 at 2-3 (Tables B and C).

[11] *Id.* at 12 (Table 2).

[12] *Id.* at 11 (Table 1).

easier in all jurisdictions and to remove bars to valid paternity claims. The goals of providing all children with the means to obtain child support from both parents, and, thus, of reducing the burden placed on public assistance programs, clearly are frustrated if any or all of the states apply the new eighteen-year limitation statute prospectively only.[13]

Indeed, prospective application leads to an absurd result. Pennsylvania's congressionally-mandated eighteen-year statute took effect in January, 1986. By allowing prospective application only, the Pennsylvania court has declared that the federal program, which was intended to be in effect in all states by 1986,[14] will be phased-in over a twelve year period in Pennsylvania. The protection of the Amendments' limitation provision will not be available to all non-marital children in that jurisdiction until 1996. As a result, benefits from reduced welfare costs resulting from increased child support contributions necessarily will be reduced in accordance with the number of children deprived of the ability to establish paternity.

The Pennsylvania court's decision thus undercuts rather than promotes the purposes and policies underlying the Amendments. It leaves thousands of those whom Congress intended to aid without the very help contemplated by Congress—a chance to obtain monetary support from their parents. In fact, since 1969 nearly 410,000 children have been born out of wedlock in Pennsylvania.[15] By clear directive of the Amendments, each one of those children would have a current right to file a paternity claim. While figures on the number of paternity determinations have only been kept by the Department of Health

[13] The aggregate amount of child support payments received in 1985 amounted to some $7.2 billion. *Id.* at 6.

[14] Pub. L. 98-378, § 3(g)(1), (3).

[15] National Center for Health Statistics, *Vital Statistics of the United States*, Vol. 1 Natality, 1969-1982; *Advance Report of Final National Statistics*, 1983-1985.

and Human Services since 1980,[16] it is likely that as a result of the decision of the court below, thousands, indeed even hundreds of thousands, of these children have been denied that right. Because this case presents an important question of federal law, this Court should grant the Petition and resolve the critical statutory and policy issues presented.

CONCLUSION

For all of the foregoing reasons and for the additional reasons advanced in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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[16] *See* Office of Child Support Enforcement Amendments, U.S. Dept. of Health and Human Services, *Annual Report to Congress*, 1980-1985.

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Respondent.

On Writ of Certiorari to the Superior Court of Pennsylvania

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1987
CERTIORARI GRANTED JANUARY 11, 1988

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January 25, 1984—Order of Court scheduling pre-trial conference

February 17, 1984—Order of Court directing Plaintiff to respond to Defendant's Motion to Dismiss Complaint within 20 days

March 7, 1984—Answer to Defendant's Motion to Dismiss filed by Plaintiff along with Motion for Judgment in favor of Plaintiff

April 10—Order scheduling hearing for May 8, 1985

July 9, 1985—Opinion filed

August 5, 1985—Notice of Appeal to Superior Court filed

Superior Court of Pennsylvania

April 11, 1986—Appellant's Application for Permission to File an Application for Remand

April 15, 1986—Appellee's Answer to Application for Permission to File Application for Remand

October 23, 1986—Application for Permission to File an Application for Remand denied. Decision and order affirming decision of Allegheny County Court of Common Pleas

November 6, 1986—Motion for Reargument. Appellant's Proof of Service of Notice to the Attorney General pursuant to Pa. R.C.P. 235 and Pa. R.A.P. 521

November 7, 1986—Order requesting answer to Motion for Reargument be filed. Per Curiam

November 17, 1986—Answer to Motion for Reargument

December 18, 1986—Motion for Reargument denied

Supreme Court of Pennsylvania

January 20, 1987—Petition for Allowance of Appeal from the Decisions of Superior Court dated October 23, 1986 and December 18, 1986 filed

February 5, 1987—Brief in Opposition filed

May 27, 1987—Judgment entered. Petition denied, Per Curiam

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

Case No. FD83-06955

File No. ———

CHERLYN CLARK,

Plaintiff

v.

GENE JETERS,

Defendant

APPLICATION FOR CHILD SUPPORT SERVICES

I, Cherlyn Clark, request the Domestic Relations Division to provide CHILD SUPPORT services to which I am entitled upon application under federal law and the Child Support Enforcement Program of Pennsylvania.

If necessary, I request use of the Parent Locator Services, and help if necessary in establishing paternity.

My case began 8-2-83. This confirms that any child support services I requested before this form was available were sought and applied for under the Child Support Enforcement Program, described in Public Law 93-647 (1975).

Signature: Cherlyn Clark

Print Name:

Date: September 22, 1983

Counselor: ———

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

Case No. FD83-06955

COMPLAINT FOR SUPPORT

FIPS CODE: S42 CTY 003

Support for: 1 child X New -- Amended

Allegheny County X

PLAINTIFF(S)

Cheryln Clark

vs

DEFENDANT(S)

Gene Jeter

PLAINTIFF INFORMATION:

Name: Cherlyn Clark

Address: 2525 Chauncy Drive

Pittsburgh, PA 15219

Birthdate: 10-29-49

Social Security No. 191-04-055[illegible]5

Telephone No. 621-0539

DEFENDANTS FOR WHOM SUPPORT IS SOUGHT:

Tiffany Clark 6-11-73

• • • •

DEFENDANT INFORMATION:

Name: Gene Jeter

Address: 2342 Webster Avenue

Pittsburgh, PA 15219

• • • •

1. Date Married: ————, Location: ———— Common Law: —— yes —— no.
2. If not married, state name, date, place of birth of each child born out of wedlock:

   Tiffany Clark 6-11-73 Mercy Hospital

• • • •

6. Amount of Public Assistance received for: Mother and 1 child

   Amount: 131.00 Per: 2 weeks

   State if claim is assigned IV-D Agency: — yes — no.
7. Amount of support asked for spouse and child(ren), parent(s), or child(ren) only:

   Undetermined

• • • •

9. Set forth any information to aid in locating the defendant:

   Age: 46 Weight: 170 Height: 5'11" Color of hair: Black Race: Black

   Color of eyes: Brown Glasses: — yes X no Scars/marks: ————

• • • •

WHEREFORE, Plaintiff respectfully prays that an order be entered against Defendant in favor of Plaintiff in the amount of $—— per month for support of Plaintiff and/or child(ren) and/or parent(s) or child(ren) over 18 years of age.

I verify that the statements made in this Complaint are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

/s/ Cheryln Clark
Plaintiff's Signature

DATE: 8-2-83

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

Case No. FD 83-06955

CHERYLN CLARK,
Plaintiff

vs.

GENE JETER,
Defendant

ORDER OF COURT FOR BLOOD TESTS AND SUBSEQUENT CONFERENCE

AND NOW, this 5th day of October, 1983 it appearing to the Court that the defendant has not acknowledged paternity of the child Tiffany Clark born on June 11, 1973 in Pittsburgh, Pa., to Cheryln Clark, mother, the parties are hereby directed to present themselves at the University of Pittsburgh Paternity Testing Laboratory, 3600 Forbes Ave., Pittsburgh, PA. 15213, promptly at 8:00 a.m. on October 17, 1983 for blood tests. Parties are to remain until permission to leave has been granted by the person in charge.

Doctors Bruce Rabin and G. Singh, or such other medical doctors or technicians who are designated by them or either of them, are hereby appointed by the Court to make the blood tests, to take or direct the taking of such number or samples of blood from the respective persons and to repeat the process of taking additional samples of blood from their respective persons to enable the examiners to make and perform such tests for the Court with a view to advising the Court of their professional opin-

ions concerning the possibility, probability, or certainty of whether the alleged father could be the biological father of such child.

If any of the parties call the doctors hereinabove named as expert witnesses, the costs of said experts shall be paid in advance by the parties calling them.

Failure to appear will constitute *Contempt of Court*, and the party failing to appear will also be charged with the costs of the blood tests.

IF ANY PARTY REFUSES TO SUBMIT TO SUCH TESTS OR FAILS TO APPEAR, THE COURT MAY RESOLVE THE QUESTION OF PATERNITY AGAINST SUCH PARTY.

In the event that Defendant is excluded by the blood tests, an order will be issued by the Court.

If Defendant is not excluded, it is FURTHER ORDERED that the parties hereto are directed to appear before J. L. Ward, Counselor, or whomever else may be designated on the 17th day of November, 1983 at 10:15 a.m., to review the blood test reports and to determine the future course of this case.

Failure to appear at the conference may result in a hearing being held at that time and the Court may resolve the question of paternity.

THIS IS YOUR FINAL NOTICE TO APPEAR FOR BLOOD TESTS AND CONFERENCE. You may be entitled to be represented by court appointed counsel, free of charge, if you are indigent.

BY THE COURT:

/s/ Musmanno, J., J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

[Title omitted in printing]

ORDER OF COURT FOR PRE-TRIAL CONFERENCE

AND NOW, to wit, this 24th day of January, 1984, the Court being informed that a conference was held with the parties subsequent to the report of blood tests. Notwithstanding the said report, the defendant will not acknowledge paternity of the child, Tiffany Clark, born on June 11, 1973 to Cheryln Clark, mother.

A pre-trial conference shall be held by the Court with all the parties, and their attorneys, who shall appear on the 16th day of February, 1984, at 2:15 p.m. before Strassburger, Judge.

If plaintiff fails to appear for pre-trial conference as above scheduled, the Sheriff of Allegheny County will be directed to bring the plaintiff to Court.

If the defendant fails to appear for pre-trial conference, paternity will be established against him and an appropriate order for support and cost of blood tests will be entered against him.

NO ADDITIONAL NOTICE WILL BE GIVEN TO THE PARTIES.

BY THE COURT:

/s/ Strassburger, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

(Title Omitted in Printing)

**MOTION TO DISMISS COMPLAINT
AND ENTER JUDGMENT IN FAVOR OF DEFENDANT**

Defendant, Eugene Jetter, by his attorney, Craig A. McClean, Esquire, hereby moves this Honorable Court for an order dismissing the complaint herein and directing entry of Judgment in favor of defendant pursuant to the provisions of 42 Pa.C.S.A. § 6704(e).

This motion is based on the ground that plaintiff's action has no merit in that the action is barred by the statute of limitations.

This motion is based on the pleadings of record herein and on the affidavit of Eugene Jetter filed herewith.

Respectfully submitted,

/s/ Craig A. McClean
CRAIG A. MCCLEAN
Attorney for Defendant

COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF ALLEGHENY :

AFFIDAVIT IN SUPPORT OF ANSWER TO MOTION TO DISMISS COMPLAINT AND ENTER JUDGMENT IN FAVOR OF DEFENDANT

Before me, the undersigned authority, personally appeared EUGENE JETTER, who, being duly sworn according to law, deposes and states as follows:

1. that Tiffany Clark was born on June 11, 1973;

2. that he is *not* the father of Tiffany Clark;

3. that the action for paternity filed against him was filed in 1983, a period of time in excess of six years from the child's date of birth;

4. that he never voluntarily contributed to the support of Tiffany Clark; and

5. that he never acknowledged in writing his paternity in regard to Tiffany Clark.

/s/ Eugene Jeter
EUGENE JETTER

SWORN to and subscribed before me this 23 day of Nov., 1983.

/s/ Carol A. Kronz
Notary Public

(Notary Seal Omitted in Printing)

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

(Title Omitted in Printing)

PLAINTIFF'S ANSWER TO DEFENDANT'S MOTION TO DISMISS AND TO ENTER JUDGMENT IN FAVOR OF DEFENDANT AND PLAINTIFF'S MOTION TO ENTER JUDGMENT IN FAVOR OF PLAINTIFF ON THE RECORD

Plaintiff, Cheryln Clark, by her attorneys, Neighborhood Legal Services Association and Evalynn Welling, hereby answers Defendant's Motion to Dismiss the Complaint and to Enter Judgment in favor of the Defendant and further moves this Court to direct entry of judgment in favor of Plaintiff as follows:

ANSWER

1. The statute which Defendant claims bars Plaintiff's action (42 Pa. C.S.A. Section 6704(e) is unconstitutional and violates Plaintiff's rights and her daughter's rights to equal protection and due process guaranteed to them by the Fourteenth Amendment of the United States Constitution.

2. Even if the statute is not unconstitutional, its operation has been tolled by the fraudulent or misleading actions and inactions of the Department of Public Welfare and the threats and assault by Defendant which prevented Plaintiff from an earlier filing of her Complaint for Support.

MOTION FOR ENTRY OF JUDGMENT
IN FAVOR OF PLAINTIFF

3. The blood test performed by the Court-appointed laboratory in the within case reveals a probability of 99.3% that Defendant is the father of Tiffany Clark.

4. This motion is further based upon the pleadings and blood test records herein as well as on the attached affidavit of Cheryln Clark filed herewith.

Respectfully submitted,

/s/ Evalynn Welling
EVALYNN WELLING
Attorney for Plaintiff

AFFIDAVIT IN SUPPORT OF ANSWER TO MOTION TO DISMISS COMPLAINT AND ENTER JUDGMENT IN FAVOR OF DEFENDANT

Cheryln Clark, who, being duly sworn according to law, deposes and states as follows:

1. That she is the Plaintiff in the above action and the mother of Tiffany Clark, born June 11, 1973.

2. That Eugene Jeter is the father of Tiffany.

3. Cheryln Clark dated Eugene Jeter for ten months prior to the conception of Tiffany. Mr. Jeter was married at the time.

4. When Plaintiff told Eugene in September, 1972 that she was pregnant, he insisted she get an abortion. He repeatedly insisted that she get an abortion and she repeatedly refused.

5. On one occasion after she told Eugene that she would not get an abortion, he drove her to the parking lot of a store in Oakland, pushed her down between the bucket seats of the car, began choking her and told her he did not want to be involved. When he released her, he beat the steering wheel of the car and threatened her again.

6. After this incident she terminated her relationship with Eugene Jeter.

7. Plaintiff listed David Green, a ficticious person, as the father of Tiffany on Tiffany's birth certificate rather than Eugene Jeter, because she was afraid of being physically harmed by Mr. Jeter.

8. When she applied for public assistance on or about June, 1973, she told her caseworker that David Green was the father of Tiffany and that she did not know his whereabouts.

9. On or about July 1973, when Tiffany was approximately one month old, in response to a request she made for money for Tiffany, Mr. Jeter drove a friend to her house and had the friend deliver $10.00 to pay for milk for Tiffany.

10. On or about August 1973, she met with Eugene Jeter at her sister, Rose Carter's home, to discuss Tiffany's support, at which meeting Mr. Jeter refused to provide her with support.

11. On or about the last week in December, 1977, Mr. Jeter gave her $25.00 for a Christmas present for Tiffany.

12. On or about June, 1978, Mr. Jeter gave her $25.00 for Tiffany after she requested the money. Her cousin, Mr. George Johnson, accompanied her to Mr. Jeter's barber shop when she received the $25.00.

13. On or about August 1978, she informed her caseworker from the Department of Public Welfare, Joanne Zarzeczy, that Eugene Jeter was the father of Tiffany and David Green was a ficticious name. An application for child support services was made by the caseworker and an interview with a support officer was scheduled.

14. On or about August 1978, she met with a support officer and provided him with Eugene Jeter's address and the license plate number of one of his cars.

15. Plaintiff was not told in August 1978 by her caseworker or the support officer that it was necessary for her to make application for support payments in the Family Division of the Allegheny County Court of Common Pleas.

16. On or about late May or early June, 1981, on two different occasions, Eugene Jeter gave her money for Tiffany's support; the first time, occurred when they met in front of Vann Elementary school and he gave her $30.00 in response to her request for money. The second

time occurred when she met Mr. Jeter as she was getting off a bus and he voluntarily gave her $5.00 for Tiffany's support.

17. From 1978-1983, she periodically asked her caseworker at the Department of Public Welfare about Mr. Jeter's responsibility to support Tiffany, but she was not told what action was being taken by the Department. She was not told at any time until 1983, that she was responsible for going to the Family Court Division to file for support. During this period she had four different caseworkers.

18. On or about August, 1983, her caseworker, Pauline Dougherty, for the first time, told her that she would have to go to the City County Building to file for support, which she did.

19. On October 5, 1983, a support hearing was scheduled but Mr. Eugene Jeter did not appear. The counselor at that hearing told her that given the circumstances, it would be necessary for her to file a paternity action against Mr. Jeter. The counselor had her fill out the necessary forms to file the paternity action.

20. On or about October, 1983, she called Mr. Jeter and asked him why he did not come to the support hearing at which time he threatened her and told her he would give her money if she would drop the case.

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF ALLEGHENY)

BEFORE ME, the undersigned authority, a Notary Public in and for said County and Commonwealth, personally appeared Cheryl Clark, who, upon being duly sworn according to law deposes and says that the facts set forth in the foregoing Affidavit are true and correct to the best of her knowledge and belief.

/s/ Cherlyn Clark

SWORN TO and subscribed before me this 8th day of February, 1984.

/s/ Karen J. Monk
Notary Public

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

(Title Omitted in Printing)

TRANSCRIPT OF HEARING

* * * *

[3] WEDNESDAY MORNING SESSION

May 8, 1985

(Thereupon, all witnesses were sworn.)

THE COURT: We are here today on an issue framed by defendant's motion to dismiss the complaint and plaintiff's answer thereto and basically the question is whether the Statute of Limitations bars this paternity action. I guess for procedural purposes, we can stipulate as to the date of birth of the child and the date that the complaint was filed.

The child was born June 11, 1973 and the complaint was filed, it doesn't really matter which date is used, either September 22 or September 23, 1983. I generally use the date on the document that is filed with the Court here. There sometimes is a delay in taking the papers over to the Prothonotary's Office. In this case it is a shorter delay than usual, only one day. It doesn't really make any difference whether we use the 22nd or [4] 23rd, just so we have a single date. I will call it the 22nd.

MISS WELLING: Fine.

THE COURT: With that as the preface, it would seem that the defendant made out a prima facie case that the statute has been run, and, therefore, the burden would then shift to the plaintiff to show why this statute has been tolled for one reason or another. I think it is the plaintiff's burden of going forward at this point.

MISS WELLING: We will proceed at this time, Your Honor. We have a stipulation to enter into on the record between Mr. McLean and myself. We are stipulating to the admission of the birth certificate of Tiffany Lynn Clark as Exhibit 1.

THE COURT: Slow down. This is Plaintiff Exhibit 1, the birth certificate.

MISS WELLING: Yes. The application for child support services, Pennsylvania Child Support Program is Exhibit 2.

THE COURT: The date on that?

[5] MISS WELLING: 8/17/78. Authorization to change beneficiary and to pay order in arrearages to Commonwealth of Pennsylvania, Department of Public Welfare.

THE COURT: Would you go through that again?

MISS WELLING: Authorization to change beneficiary and to pay order and arrearages to the Commonwealth of Pennsylvania, Department of Public Welfare. Exhibit 3.

THE COURT: The date on that?

MR. McLEAN: 8/16/78.

MISS WELLING: Notice of support referral, Department of Public Welfare, 8/16/78 is Exhibit 4. And child support action notice August 17, 1978. That would be Exhibit 5. Exhibits 1 through 5 are contained in Cherlyn Clark's Department of Public Welfare case record.

I have the caseworker here to testify, but because of this stipulation we will now let her go.

THE COURT: I think maybe we better [6] keep her here for a few minutes.

MS. WELLING: That is the end of the stipulation.

THE COURT: Put the caseworker on, there may be a couple of questions that I want to ask her.

MR. McLEAN: I am not stipulating, all I am doing is not objecting.

THE COURT: To authenticity.

MR. McLEAN: Authenticity of documents, that's all.

MISS WELLING: I was intending to have Ms. Rhodes testify solely as custodian of records. She was not the caseworker on this record at anytime.

THE COURT: This raises some questions I have.

DOLORES RHODES,

called as a witness herein, being first duly sworn, was examined and testified as follows:

[7] DIRECT EXAMINATION

BY MISS WELLING:

Q State your name for the record.

A Dolores Rhodes.

Q Ms. Rhodes, your occupation?

A Income Maintenance Worker Two, Commonwealth of Pennsylvania.

Q What does an Income Maintenance Worker do?

A I am the caseworker for Cherlyn Clark and other clients.

Q As the caseworker, what function do you perform?

A I determine whether they are eligible for assistance, determine the amount of the assistance they get, the benefits, I really take care of their whole case.

Q And as part of that function as being the caseworker, are you custodian of a Public of Welfare, Department of Public Welfare case record?

A Yes.

Q Was there such a case record compiled for Cherlyn Clark?

A Yes.

Q Are you presently the custodian?

A Yes.

[8] Q Are these case records kept in the normal course of business of the Welfare Department?

A Yes.

Q Are the contacts and information having to do with the individual recipient of Welfare contained in the case record?

A Yes.

Q Are they written down contemporaneously, or close to the same time that they occur?

A Yes.

Q When did you come on this case yourself?

A I think it transferred to me last year, I'm not certain. It is written in the dictation there.

Q I will give you the record.

A I'm pretty sure it was April of last year. It was April of '84 when I took over the case record.

Q Were you an employee for the Department of Public Welfare in 1978?

A Yes.

Q Are you aware of what the policy is and procedures in the handling ot support actions from the Welfare Department were at that time?

A I wasn't a caseworker at that time, I was in clerical [9] as a clerical worker.

MISS WELLING: Those are all of my questions.

THE COURT: Do you know if Ms. Clark would have been directed to come down to the Domestic Relations Department to file a support complaint?

THE WITNESS: Yes, it is an eligibility requirement before you could be put on assistance that you go to the Court to file for support.

THE COURT: Apparently she did not do that?

THE WITNESS: I can't say if she did or not.

THE COURT: We don't have a complaint filed until 1983 and she apparently was on Welfare at least as early as 1978?

THE WITNESS: If you can claim good cause like if you are afraid of the man or afraid that he may bother you, you can claim good cause and they will let you not file for support.

THE COURT: Would that have been in [10] writing?

THE WITNESS: Usually a form. One thing, there may have been at one time more to this record. In the last two years we have been allowed to purge records, that meant, I will see her tomorrow for redetermination interview. Once I see her, I will take everything of this record from 1980 and throw it away.

THE COURT: If you throw things away, do you have a record, would there be no record of what was thrown away?

THE WITNESS: No, we are allowed to purge them. They want them purged.

THE COURT: You don't even have a listing of the documents thrown away when you throw them away?

THE WITNESS: No, we are supposed to keep all the support records of payments. Anything other than that, you are supposed to purge. We have been directed to purge them. I don't know, whoever had the record before me if anything had been thrown away.

[11]

CROSS-EXAMINATION

BY MR. McLEAN:

Q Can you tell from your records whether Miss Clark was receiving welfare for the benefit of her child, Tiffany Clark before August 16 of 1978?

A It should be on the face sheet. Right here, this record was opened, this is usual. This date here is usual when this case was opened. This case here is 9/26/79, right here. On the face sheet. There is not an older face sheet. I have to assume this is when she first made application.

THE COURT: When? In 1979? These documents are from '78.

THE WITNESS: Well, there could have been an older face sheet in there since you could purge the record, that may have been destroyed.

THE COURT: The child support action notice has dates referred to child support unit of October 2, 1975.

THE WITNESS: This is the latest face sheet. They do change them. It might have been filled up. That is the last entry on [12] there.

BY MR. McLEAN:

Q I will show you that document that Judge Strassburger mentioned. I will ask you if you can from this document ascertain whether the child was receiving welfare prior to August 16 of 1978?

A This would have been filed, one of our forms that she would have been sent, that, this is making me nervous. This is one of our forms we would have had to have in our records if this child was receiving assistance. This worker works at my office now.

Q Are you aware whether the requirement that as a condition of eligibility the claimant named a father existed in 1975?

MISS WELLING: Objection, she testified she wasn't involved with being a caseworker, she was clerical.

THE COURT: Overruled, she can answer the question.

THE WITNESS: No, some people said they didn't know who the father was.

[13] BY MR. McLEAN:

Q Was it a requirment—

THE COURT: The question was, are you aware whether it was a requirement?

THE WITNESS: No, I'm not aware.

BY MR. McLEAN:

Q Are you aware whether in 1975 a person had to file a support action?

A Yes, I am, they did.

Q Are you aware in this case whether Miss Clark ever filed a support action against David Green?

A No, I'm not, I wasn't there at the time.

THE COURT: Do we know whether she did, does anybody know whether she did?

MISS WELLING: She knows.

MR. McLEAN: No, I searched the files, Your Honor. I searched both criminal records and searched the records that we have up here and as an officer of the Court, I state that there is no record of an action for support.

THE COURT: We have beat that dead horse. Thank you.

MISS WELLING: What clarification for [14] the record, that last exhibit referred to by Ms. Rhodes was dated 1978. It has notations regarding 1975.

THE COURT: Yes.

MISS WELLING: I call Cherlyn Clark.

CHERLYN CLARK,

called as a witness herein, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MISS WELLING:

Q Will you state your name.

A Cherlyn Clark.

Q Where do you live?

A 2525 Chauncey Drive.

Q When were you born?

A October 29, 1949.

Q Do you know Gene Jeter?

A Yes, I do.

Q When did you first get to know him?

A Back in 1971.

Q What was your relationship at the time?

[15] A We were dating.

Q How old were you then?

A Twenty-one.

Q Were you working?

A Yes.

Q Did you at any time after you started to date Mr. Jeter have sexual intercourse with him?

A Yes.

MR. McLEAN: Objection.

THE COURT: What's the objection?

MR. McLEAN: The line of inquiry isn't material. We are solely here to discuss specific issues which are related to only the issues of statute and estoppel.

THE COURT: With the possible exception of one case in history, there haven't been any children born without sexual intercourse.

MR. McLEAN: We stipulated to the birth of the child.

MISS WELLING: One of the claims we have raised is that of duress which is as a result of an assault which was the result of a conversation having to do with this [16] pregnancy.

THE COURT: It may be relevant for background. If you lose this case you will get your discovery done for the paternity case, what do you care?

MR. McLEAN: Thank you.

BY MISS WELLING:

Miss Clark, about when did you become pregnant?

A Late September or October of '72.

Q Did you have any discussion with Mr. Jeter about this?

A Yes.

Q What was that?
A I told him I was pregnant.
MR. McLEAN: Objection, I would like some statement as to the time.

BY MISS WELLING:

Q About what time did you tell him you were pregnant?
A In the afternoon.
THE COURT: I think what month and what date during the year.

BY MISS WELLING:

Q Was it close to the time you found out you were [17] pregnant?
A Yes.
Q You say you told Mr. Jeter one afternoon close to the time you found out you were pregnant. What was his reaction?
A He said, "I knew it."
Q Did he say anything else?
A No, not at that time.
Q Did you have any other conversations with him later?
A Yes.
Q What did he say then?
A He said to me, "I want you to have an abortion."
Q What was your response?
A I said, "I'll think about it."
Q Did you think about it?
A Yes.
Q Did you tell him what you decided after you thought about it?
A Yes, I did.
Q What did you tell him?
A I told him I wasn't going to have no abortion.
Q What happened then?
A Well, he drove me home.

[18] Q You were in the car?
A Yes.
Q In his car?
A Yes, his car. When I told him I wasn't going to have an abortion, he drove off and he drove down Bedford Avenue real fast. He went through all the stop signs. We ended up on the Blvd. and he swung in Isaly's parking lot.
Q The Blvd. of The Allies?
A Right. He pushed me down betwen the front seats of the car and he straddled me and started choking me.
Q Were you smaller then than you are now?
A Yes, I was.
Q What was your approximate weight?
THE COURT: A lot of us were.
MISS WELLING: Isn't that the truth.
THE WITNESS: About 135, 140.

BY MISS WELLING:

Q So he pushed you down between the seats in his car?
A Yes.
Q What kind of car was it?
A I believe a Firebird.
[19] Q Bucket seats?
A Yes.
Q What happened after he pushed you down?
A Well, he just started choking me saying you're going, excuse my language, fuck me up, you know, he kept saying that over and over.
Q Then what happened?
A I was crying and he got off me and he pulled out of Isaly's parking lot and drove down past Magee Hospital. He stopped. He started beating the steering wheel repeating himself, "you're going to fuck me up", over and over again. And then he drove me home. I got out of the car.

Q This incident happened right after you told him you weren't going to have an abortion?

A Yes.

Q Had you ever known Mr. Jeter to carry any weapons?

A Yes.

Q What?

A I have seen him with a gun on him before.

Q What was your response to this incident when he was choking you and you were yelling, was he yelling at you?

[20] A Yes, he was.

Q What was your response?

A I was very afraid and I was crying because he hurt me at that time.

Q Did you continue in the relationship?

A No.

Q How did you break it off, did you?

A Well, during the time I was pregnant, we just didn't talk to each other. He wouldn't come near me. He wouldn't have anything to do with me. He said, "If you have that baby, that's all on you."

Q Did you talk to anybody in your family about the incident with his choking you?

A Yes, I did.

Q Who did you talk to?

A My sister.

Q What is her name?

A Rose Carter.

Q Did you tell her about it close to the time that it happened?

A Yes.

Q Did you confide in anybody else in your family about it?

A No.

[21] Q Why was that?

A I knew that if I was to tell my family, my brothers would probably have gone down to his job and they probably would have had some trouble.

Q What kind of trouble do you think?

A A fight.

Q Tiffany was born in June of 1973?

A Yes.

Q You didn't list any name on her birth certificate, did you?

A I listed David Green.

Q I think in the birth certificate—

MR. McLEAN: Objection, counsel is making statements.

THE COURT: Sustained.

MISS WELLING: Let me show it to her.

MR. McLEAN: I ask for an offer of proof on this showing. There is no statement from the witness that there is any loss of memory or anything else to warrant her being shown that document.

MISS WELLING: Your Honor, it is an [22] exhibit in the case. I want to show her the exhibit and ask her some questions about it.

THE COURT: You can do it, but, of course, the statement she listed David Green is on the record.

MISS WELLING: That is correct.

BY MISS WELLING:

Q This is Exhibit 1 which came out of your welfare record. I see here that it said birth certificate for Tiffany?

A Yes.

Q It says sex, female. It has her name. David Green is not listed on there. What explanation did you have for that, you just testified you listed David Green.

A I made up the fictitious name because after Gene jumped on me that time, I was afraid to list him. I didn't know what he would do to me.

Q So Gene Jeter is not listed on this exhibit, that is for the reason you just said?

A Right.

Q At the time Tiffany was born, did you apply for [23] welfare?

A Yes, I did.

Q And did you tell the Welfare who the father was?

A Yes, I did.

Q Who did you tell Welfare that the father was?

A David Green.

Q Why did you tell Welfare that David Green was the father?

A Well, I just made up that name. They know she had to have somebody for a father. I just made up that name.

Q Did you tell the Welfare people you were making up a name?

A Not at the time I didn't.

Q After Tiffany was born, did you see Gene Jeter again?

A Yes.

Q Did you ever in the first few months after Tiffany was born, receive any support from him?

A Well, when Tiffany was two months old he came to my sister's house and we had a discussion about support. At that time he said he knew this was going to happen and he didn't have any money to help support her.

Q This was at your sister's house?

[24] A Yes.

Q Did he ever send you any money to the house around that time or before?

A Yes.

Q Do you remember when that was?

A Yes, I got $25 from Gene in December of 1977.

Q I'm talking about right after Tiffany was born, did he give you any milk money for the baby?

A Yes, he did.

MR. McLEAN: Objection, Your Honor, I would like to make a request here. Please let the record show that the witness has in her hand a piece of paper. I have

noticed the witness from the questions which have been directed to her referring to this piece of paper. I believe she is testifying from this piece of paper and that the words that she is putting on the record in answer to these questions aren't her own words and I request to see the piece of paper right now.

THE COURT: You are entitled.

MISS WELLING: Go ahead.

[25] MR. McLEAN: Let the record show I am giving the piece of paper back to the witness.

THE WITNESS: Thank you.

BY MISS WELLING:

Q Miss Clark, what is on that piece of paper?

A I just have here the times Gene has given me money.

Q Where did you get those times from?

A That's the times he really gave me money. I just wrote them down because I knew I would be nervous up here and I did not want to mess up, you know.

Q Something you wrote down yourself?

A I wrote this down myself.

Q Did you write it down from your own memory?

A From my own memory, yes.

Q You wrote it down so you wouldn't be nervous and forget when you got up here?

A Right.

MR. McLEAN: Your Honor, may I have some inquiry whether the witness's testimony with respect to these events and specific times has been exhausted and whether she is testifying from the piece of paper or whether [26] she actually does remember? I think I am entitled to that.

MISS WELLING: I think she just testified she had written down this stuff from her own memory. I will ask her.

THE COURT: Well, she's supposed to testify from her own memory without any aids unless she needs the

aid after she said she can't remember to help refresh her recollection. If she has no recollection at all, then she can use the document that is past recollection recorded, if it meets the standards for that exception to the hearsay rule. Apparently this doesn't. It might meet the exception for present recollection refreshed. We are in no person's land at this point.

BY MISS WELLING:

Q Miss Clark, let's go back and just try, fold up your piece of paper now, and let's go back to the things you actually remember. Things you remember here today. If you find you can't remember something, then we will talk about whether you can look at the piece of paper to help you remember [27] the dates. In the first couple of months after Tiffany was born, in the summer of 1973, you had testified you had gotten some money from Mr. Jeter to help pay for milk. Do you remember how much money it was?

A I believe it was about $10.

Q How did you get that money?

A He sent the money in by some young man to give to me.

Q He didn't actually come to your house?

A No, he did not.

Q Some young man came?

A Yes.

Q How did you know it was Mr. Jeter who sent it?

A He told me that Gene sent the money.

Q Did you see Gene at that time?

A He was parked outside in the car.

Q He didn't come in?

A No, he didn't.

Q Also during that same summer when you were talking about, you testified you had some kind of meeting with Gene after Tiffany was born.

A Yes, I did.

Q How old was Tiffany at this time?

[28] A I believe she was two months old.

Q Had you called up Mr. Jeter to initiate this?

A No, I didn't.

Q The meeting went on at your sister's house?

A Yes.

Q Miss Rose Carter?

A Yes.

Q What happened?

A We discussed support. He said, "I knew this was going to happen and I can't support Tiffany." He said, "I might give you something from time to time, but that is all I'm going to do."

Q Was this a calm meeting?

A Not really.

Q Was there any anger expressed by anyone?

A Well, I could tell he was mad. I was upset, you know, but we wasn't shouting at each other.

Q Now, at this meeting, did he give you any money at that time?

A No, he did not.

Q You said he was mad and you were upset, at this time he essentially told you—

MR. McLEAN: Objection, a lot of [29] latitude as to even specific directions of time

THE COURT: Your point is made, the objection is sustained. There is not enough time for speeches.

BY MISS WELLING:

Q What I am trying to ask you, why didn't you file a support complaint after you had this conversation with Mr. Jeter?

A Well, I still was afraid that if I made it legal, I didn't know what he would do.

Q Why is that?

A Because when I was pregnant, he attacked me that one time and I didn't know what he would do if I really made it legal.

Q What do you mean by really made it legal?

A Well, came down here and made him support Tiffany, put him down as her father.

Q How was that different from just asking him for money?

A Well, I knew that he has given me money a few times. He didn't seem to be upset about that. I knew that if he was made to do it, he would not really [30] want to do it. I didn't know what he would try to do to me.

Q Now, did you ever later receive any more support payment from him?

A Yes.

Q Do you remember what the next one was?

A I believe December of 1977.

Q Is that around Christmas time?

A It was after Christmas.

Q What was the circumstances then?

A He came up in my home and gave me $25 for Tiffany for some shoes.

Q Had you asked him to give you the money?

A Yes, I did.

Q How did you ask him?

A I called him up and I asked him would he please buy her something for Christmas. He said, "What does she need?" I said, "Some shoes." So he brought up $25.

Q And then after that Christmas of 1977, did you again get any more money from him?

A Yes, I believe June of 1978.

Q What happened then?

A I went to his shop.

[31] Q What kind of shop?

A A barber shop at that time. He gave me, I think $25 for Tiffany's birthday.

Q Her birthday is in June?

A Yes.

Q When you went to the shop, what was your conversation with him at that time, if you can remember?

A I asked him, I said her birthday is next week and would you give me something for her birthday and he gave me $25.

Q Did he give you any more money then?

A No, not then.

Q After that time?

A Yes.

Q When was that?

A He gave me some more money I believe it was the next year. I would have to refer to my notes.

Q Let's go back here, this was in June of 1978 that you said he, you went to the barber shop and he gave you $25 for her birthday. The exhibits that have been entered in this case show that in August of 1978 you apparently went to the Welfare Department to talk about Gene and [32] support. Can you explain to the Court what went on then?

A Well, I came down and spoke with the claim officer and I gave them Tiffany's father's correct name and I gave them his address and everything I knew, all the information I had on him. I told them that I wanted to file support for Tiffany.

Q What happened that made you decide to go legal, whatever, at this point?

A Well, I became frustrated because Gene never really wanted to help support Tiffany. He didn't mind giving money now and then, but that just wasn't enough. You know, so I just felt confident and I felt that it was time I took a stand and just came forth with the truth.

Q Were you no longer afraid at that point?

A No, I was not.

Q Why do you think you weren't afraid anymore?

A Well, because I'm older and I have matured and I just feel as though it was the right thing to do.

Q Now, I would like to show you the exhibits. These are papers that have been entered as Exhibits 2 through

5 in your case as the application [33] for child support services, authorization to change beneficiary into, pay order and arrearages. Notice support referral and child support action notice. Have you seen those papers before?

A Yes.

Q Were these papers that you were involved in having filled out in 1978 when you went to the Welfare Department?

A Yes.

Q What was your intent when you cooperated with the Welfare Department in filling these papers out?

A My intent was to try to get support for Tiffany.

Q And at the time that you did this, did you tell me whether or not you felt there was anything else you had to do in order to get support for Tiffany?

A No, I did not. I thought that once I gave the Welfare the information, that they would pursue it. I didn't know that I had anything else to do.

Q What is it that made you think that?

A Because the Welfare usually got behind women to sue the fathers to take care of these children. [34] I thought once I gave them the correct information, that was all I had to do.

Q At the time that you went to the Welfare Department and gave them this information and these forms were filled out, did anyone tell you that you then also had to go to the Court and fill out more papers?

A No, they did not.

Q Did anyone tell you that you had to go to Court at all?

A No.

Q In the next few years after 1978, did you hear anything from anybody regarding your support?

A Yes, one of my workers, Mrs. Farrow, I was discussing this case with her. She told me I have to go to the City-County Building to file support.

Q When was that?

A I believe it was four years later. I don't remember the exact date, in '82 or '83, I don't know.

Q Did you go to Court to file papers with the Court after that?

A Yes, I did.

[35] Q In the time between 1978 and 1982 or 1983, whenever it was that they told you that you had to go to Court, did you talk to the Welfare Department at all about what was happening on your support action?

A Yes, I did.

Q What was the gist of those conversations?

A They would just say it was backlog and they didn't know anything else.

Q Was this in response to questions by you?

A Yes, it was.

THE COURT: I'm not sure what the thrust of this is. I thought in chambers you indicated this fell within virtually identical facts of Astemborski and you weren't pursuing the ground that she had attempted to file by filing with Welfare.

MISS WELLING: Your Honor, as to the state being the grounds for toll of the statute, that's true, I'm not pursuing that. I think the mistake and lack of information are relevant to the Picket and Mills test for determining whether or not the statute is valid in this [36] particular kind of case. Those are factors that I picked up on by those courts as reasons that the six year statute reasons that the statute of limitations in paternity action is inappropriate.

THE COURT: Okay, if you are preserving your grounds for the petition for certiorari to the United States Supreme Court, I will let you make that record. That's a long way away.

MISS WELLING: Yes, it is, Your Honor.

BY MISS WELLING:

Q Now, after 1978, anytime before you actually went to Court to apply for support, did Mr. Jeter give you any more money for Tiffany?

A He gave me, I believe he did.

THE COURT: Since we don't have all day, let her refresh her recollection by looking at the document.

MR. McLEAN: Could I look at the document again, Your Honor? The piece of paper?

THE COURT: The piece of paper, [37] whatever. It is not the magna carta. It is still a document I suppose.

MR. McLEAN: Let the record show I am handing the witness the piece of paper.

THE WITNESS: I received money.

MR. McLEAN: Would you ask her if her recollection is refreshed, please?

BY MISS WELLING:

Q After looking at this paper, is your recollection refreshed as to the answer to my question that you received any more money between 1978 and 1982 or '83 from Mr. Jeter?

A Yes.

Q Without looking at the paper, can you testify from your own memory?

A Yes, the end of May, 1981 I got $30 from Gene. The following week he gave me $50.

Q Was that in response to your request?

A The first time when he gave me the $30 I had approached him about giving me some money for Tiffany. The second time which was the next week he just drove up and said here, here's something [38] for Tiffany.

Q Did he say anything at that time about why he was giving you this money?

A No.

Q Just here, it's for Tiffany?

A Yes.

Q Did he give you any more money between that time, the first week in June, is that what you said?

A The end of May.

Q The end of May, 1982?

A '81.

Q '81, I am sorry. The end of May, 1981, between the end of May, 1981 and the time you went to Court to file the papers, support papers, did he give you any more money for Tiffany?

A No, he didn't.

MISS WELLING: Those are all of my questions.

CROSS-EXAMINATION

BY MR. McLEAN:

Q Miss Clark, did you call him up at any time between May of 1981 and August of 1983 to request money?

[39] A No, I didn't.

Q Did you go to see him?

A No, I didn't.

Q Do you know your welfare caseworker's telephone number?

A Not by heart, no.

Q How often do you go there?

A Every six months.

Q Have you been going there every six months or so since you have been on welfare?

A No.

Q Are you aware whether Welfare is charged with, the individual caseworker is charged you with making monthly reports?

A I don't know.

Q Did you talk with your caseworker over the telephone more frequently than your six months you go and see the person?

A I don't talk with my worker that often, no.

Q Has that been pretty much the way it has been all through since you have been getting welfare?

A During the time I filed for support I kept calling down there to find out what they were doing [40] with

my case. I don't call down there that often other than that.

Q It said that is, you thought that was all you had to do?

A That's right.

Q Why did you think that?

A I thought the welfare would pursue this. No one ever told me that I had to file support papers over here for Tiffany.

Q You have seen those exhibits in this case, is that correct?

A Yes.

Q I am going to show you one of the exhibits that doesn't have a sticker on it. I don't know which one it is numbered, but it is the authorization to change beneficiary pay order arrearages to the Commonwealth of Pennsylvania, Department of Public Welfare, date of 6/75.

THE COURT: Number 3.

BY MR. McLEAN:

Q I ask if you can look down at the bottom of that and identify whether that is your signature?

A Yes, it is.

Q That is your signature?

[41] A Yes.

Q I apologize to the Court and Counsel because I really actually hate this question when it is asked. Miss Clark, do you read and write the English language?

A Yes, I do.

Q Do you understand it?

A Yes, I do.

Q In the first paragraph on this, would you read at the little letter "c" to little letter "d". At the little letter "c" beginning there.

A "The undersigned waives no rights to bring an action for support order or any modification thereof, but

it is understood that the Department of Public Welfare is authorized to institute any action for support in the name of the undersigned and to request modifications of any orders made if the undersigned does not do so."

Q That's all. Now, Miss Clark, you testified that you thought that was all you had to do and nobody told you to go to Court?

A That's right.

Q Nobody told you not to go to Court, did they?

A Nobody told me to come here.

[42] Q Nobody told you not to go?

A No, nobody told me that I had to file those papers here. Nobody.

THE COURT: Please Miss Clark, just answer the question.

THE WITNESS: No, they did not.

MISS WELLING: May we have direction from the Court that Mr. McLean not raise his voice?

THE COURT: They both raised their voices at each other.

MR. McLEAN: Your Honor, with respect to time, I assume that this Court kept good notes. I am not going to ask this witness questions that compare her affidavit filed in this matter with the testimony. If you want me to direct that inquiry, I will, but it is a pleading in the case and she specifically signed it. I am not going to question her on that. If you will take due notice from your notes to compare it with regard to time and amount of support to that affidavit.

THE COURT: Fine.

[43] BY MR. McLEAN:

Q In 1973, with whom were you living?

A My grandmother.

Q Is you grandmother alive today?

A No, she is not.

Q How many brothers do you have?

A Two.

Q Wasn't it your testimony that you didn't confide in these people regarding this problem with Mr. Jeter?

A That's right.

Q Were you in your grandmother's presence as you increased in size during the term of your pregnancy?

A Yes, I was.

Q Did you have any discussions whatsoever with your grandmother regarding the birth of a child and who the father was?

A No, I did not.

Q Did you have any discussions with your brothers about any weddings or who the father of the child was?

A No, I did not.

Q You said that you asserted a fictitious name. Do you [44] know what the word fictitious means?

A Yes.

Q What does it mean?

A I believe made up.

Q False?

A Yes.

Q Inaccurate?

A That's right.

Q A lie?

A Yes.

Q You testified that you didn't know what Mr. Jeter would do?

A That's right.

Q If you came down here and put your name—

A Put his name down.

Q Put his name down. When you say here, you mean this building?

A When I filed for support, that is what I am saying.

Q So, in 1978 you were aware that this is where you came to file an action in support?

A I found out, when it—

Q Answer the question. She can't help you with the times.

[45] A I did not, when I spoke with the claim's officer in 1978, no one told me to come here to file the papers, no one.

Q You said you got older and you matured which is why you did what you did?

A Right.

Q The Welfare caseworker is here today. We have the Welfare files. You didn't out of the clear blue sky decide to call up and name Gene Jeter as the father, did you?

A No, I thought about it.

Q Is it true that Welfare contacted you and was pressing you for a name for the father of this child?

A No, they were not.

Q Isn't it true that at that time Welfare was making a big deal with you about getting somebody to pay for this child other than welfare?

A No.

Q Did you understand that by perhaps filing support, that you could get more money than you were getting on welfare?

A I knew that.

Q You got older, more mature. How old are you now?

[46] A I'm thirty-five.

Q How old were you in 1978?

A I'm getting a bit nervous.

Q Does twenty-nine sound good?

A Good enough.

Q When did you get older and more mature?

A When my daughter—

Q Were you older and mature at the age of twenty-five?

A Not as mature as I am now.

Q You testified that you called up Gene Jeter on the telephone and asked him for money for Christmas?

A Yes, I did.

Q You said the kid needed shoes?
A She did.
Q Was he supposed to mail that to you?
A He told me he would bring it up to my home.
Q Did he?
A Yes, he did.
Q Who was there, do you have any witnesses?
A My sister was there.
Q How about your daughter?
A She was there.
Q What about the meeting on the street?
[47] A It was just him and I.
Q Before that, before 1977 in December, did you have any meetings with him, did you see him around?
A Yes, I would see him.
Q You didn't run and hide, did you?
A No, I didn't.
Q You didn't have anything to hide from him?
A No.
Q Did you speak with him?
A Occasionally.
Q Did you go up to him on the street, did he talk to you?
A No.
Q You didn't avoid him, did you?
A No, I didn't.
Q You lived in the neighborhood?
A Yes, I did.
Q He worked in the neighborhood?
A Yes, he did.
Q You weren't afraid of him, were you?
A I was when I was pregnant.
Q Back when you were pregnant, but not after that? You had a degree of pride?
[48] A A while after that I was afraid of him.
Q A couple years?
A Yes.

Q At most? Did you say yes?
A Yes.
Q That is what I thought you said.
A That is what I said.
Q Your grandmother is not alive now, is she?
A No, she is not.
Q When you were with Mr. Jeter and you dated him as you said that you did—
A Yes, I did.
Q Where did you go?
A We went everywhere.
Q Do you know the names of the people you saw and the places you frequented?
THE COURT: I said you have a little bit of discovery on the paternity case, I didn't say you could take her deposition here in Court.
MR. McLEAN: With respect, I'm getting with respect to my specific point in my brief, I have reached the issue of laches. I have shown, I think with this [49] witness without even my witness that memories have failed, that potential witnesses have died and I'm now—
THE COURT: Either the statute of limitations applies or it doesn't apply. There is no laches in this case.
MR. McLEAN: I will back off of that.

BY MR. McLEAN:

Q Let me see your piece of paper. When did you make this piece of paper?
A Last night.
Q Last night, you mean yesterday, right?
A Last night, yes.
MISS WELLING: Objection, I object on the ground of relevancy.
MR. McLEAN: Would you like me to respond, Your Honor? I have a few questions about credibility. I am wrapping this thing up.
THE COURT: Let's do that.

BY MR. McLEAN:

Q Where did you get the piece of paper?
[50] A From my home.
Q And where did you get the information?
A From here (indicating.)
Q Do you remember signing an affidavit in this case?
A At my attorney's office.
Q It asserted facts and dates and things?
A Yes.
Q Have you recently seen that?
A Yes.
Q When did you see it?
A I saw it yesterday.
Q Where were you yesterday?
A In my attorney's office.
Q I am giving you back your piece of paper. Do you remember sitting in Judge Strassburger's chambers with me and with Judge Strassburger?
A Yes.
Q Nobody else was present?
A Right.
Q Do you remember the things that you said?
A Some of them.
Q Do you have any explanation to this Court why the the things you said now are different from the [51] things you said in your affidavit which are different from the things you are saying in this courtroom today?

MISS WELLING: Objection, I ask for an offer of proof on that before—there has been no testimony that her statements were materially different than the affidavit from the testimony and no record at all of what was said between the Judge and yourself and Miss Clark when I was not present.

THE COURT: He didn't ask that question and will not ask that question because he's not going to testify and I'm not going to testify.

MR. McLEAN: I will graciously withdraw the question. If I might have fifteen seconds to collect my wits. That's all the questions I have of this witness.

MISS WELLING: I have a few on redirect.

THE COURT: Be quick. Go ahead.

[52] REDIRECT EXAMINATION

BY MISS WELLING:

Q Miss Clark, you testified in your direct testimony that you were frightened to make it legal to file a support complaint?
A Yes.
Q Up until the time you actually filed it in 1978, do you remember testifying to that?
A Yes.
Q You told Mr. McLean when he cross-examined you that you were only frightened of Mr. Jeter for a couple of years. Tell me, were you talking about the same kind of fear, explain to me what the difference was between being afraid of him till '78 and being afraid until just a couple years ago?
A As I stated, when I was pregnant, I was afraid of him. He carried a gun and he did attack me and I didn't know what he would do to me if I came forth with this information. I feel that I have matured. I feel he is no longer a threat to me. I am doing this for our daughter, not for me. I feel that it is his obligation just as much as it is mine to help take care of her.
[53] Q When you testified in cross-examination that you were afraid for a couple of years, did you mean the same thing as when you said you were afraid up until the filing in '78 with the Welfare Department?
A Yes.
Q So that couple of years meant—

MR. McLEAN: Objection, objection.

THE COURT: Sustained.

MISS WELLING: That's all the questions I have.

THE COURT: You may step down.

MISS WELLING: Your Honor may I ask for a few minutes?

I am due in Bankruptcy Court at 11:00. I will have to make a phone call.

THE COURT: I expect we won't have a whole lot more testimony. I don't imagine Mr. Jeter's testimony will be lengthy?

MR. McLEAN: No, Your Honor, especially if I am permitted to lead.

(Thereupon, a recess was held.)

[54] MISS WELLING: We have another witness.

MR. McLEAN: I thought the plaintiff rested.

THE COURT: I didn't hear her say that.

ROSE CARTER

called as a witness herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MISS WELLING:

Q Will you state your name for the record please?

A Rose Carter.

Q Are you the sister of Cherlyn Clark?

A Yes.

Q Have you lived in Pittsburgh since 1973?

A Yes.

Q Since 1973, have you kept in contact with your sister?

A Yes.

Q Did you also know Mr. Jeter?

A Yes.

[55] Q How long have you known him?

A Since they were dating. I knew him prior, but I got to know him better when they started dating.

Q About when was that?

A She was twenty-one or twenty-two, something like that.

Q Were you aware that Mr. Jeter and Miss Clark had broken off?

A Yes.

Q Did you know about when that was?

A After he found out she was pregnant. They kind of stopped seeing each other.

Q Do you know what the reason was they stopped seeing each other?

MR. McLEAN: Objection, I would like to know whether she does know.

THE WITNESS: I do know.

BY MISS WELLING:

Q What was that reason?

A That she was afraid of him because Gene had jumped at her when she told him she was pregnant and he can be intimidating to her. She—

MR. McLEAN: Objection, I would like to have her answer the question. She is [56] talking about—

THE WITNESS: He had jumped on her.

MR. McLEAN: Your Honor—

THE WITNESS: My sister and I talk every day. This incident was brought to my attention.

THE COURT: Do you want to list your objections?

MR. McLEAN: Yes, Your Honor, I ask that the words that were emitted be stricken from the record as being non-responsive to the question. The question was strictly directed to a reason, what that reason was. She is going into her analysis of the mind of the witness and also of my client. I don't think she has the capacity to do that.

THE COURT: Objection sustained. Just answer the question.

BY MISS WELLING:

Q The whole answer to the question is stricken?

THE COURT: I will not try to decide [57] which part is and which part isn't.

MISS WELLING: Can you read the question back?

(Thereupon, the previous question was read back.)

BY MISS WELLING:

Q I had asked you what was the reason that your sister and Mr. Jeter had broken off, if you know.

A She had told me she was pregnant. She was afraid of the reaction afterwards.

Q Whose reaction was that?

A His reaction.

Q Mr. Jeter's reaction?

A Yes, toward my sister.

Q Had your sister talked to you about what his reaction was?

A Yes.

Q What did she tell you about the reaction?

MR. McLEAN: Objection, this is hearsay. Further, we have had—

THE COURT: Your objection is made. Any response to that?

MISS WELLING: Your Honor, I am not [58] asking this to establish the truth of it. I am asking to establish a state of mind of Miss Clark. It is also a statement of a party.

THE COURT: Your party, not an opposing party.

MR. McLEAN: Plus the state of mind is specifically what we are trying to ascertain the truth of.

THE COURT: Objection sustained.

BY MISS WELLING:

Q Miss Carter, without telling me what Cherl told you about that reaction, what was her reaction that you observed?

A She was very upset, crying, hysterically crying and very nervous.

Q This was in response to what?

A Her telling him she was pregnant.

Q After that time, after the time that she became nervous and upset and hysterical, did you have occasion to talk to Mr. Jeter about Cherl and Mr. Jeter?

A Yes, I talked with him. Him and I would always talk.

[59] Q Did you ever invite him to come to your house at any time?

A Yes, I did.

Q When was that?

A My niece was about two months old. I went to his place of business to talk with him because I could talk with him. I asked him would he mind at all having a meeting with my sister concerning the baby. At first he didn't want to. He said, well, yes. I said for a little while, talk a little bit.

THE COURT: You are going to have to speak up.

THE WITNESS: Sorry, I said the baby has to eat. So, he said all right, he came over on a Sunday.

BY MISS WELLING:

Q What happened on that Sunday, who else was there?

A My mother was there, my sister and Mr. Jeter and myself. So we talked a little bit, mostly my sister and Mr. Jeter talked. He got upset. He said he would help her a little bit. He said he couldn't, he said I don't have money. He said forget it and [60] walked out.

Q After that meeting when Tiffany was two months old, in your house, did you observe any reaction by your sister to that meeting?

A Yes, my sister was always upset when she would talk to Mr. Jeter. She was not able to talk to him because she was always frightened of him.

MR. McLEAN: Objection, I ask it be stricken.

THE COURT: The last part of that will be stricken.

MISS WELLING: Your Honor, when I asked what her reaction was—

THE COURT: The question was, what was the reaction to that last meeting. The answer was, she was upset. Then she went on to answer a question not asked.

BY MISS WELLING:

Q Did you ever observe Miss Clark, your sister, at any other time being upset about Mr. Jeter?

A Yes.

Q Will you describe the times and what you observed?

A She would be upset prior to making a phone call to him [61] to ask for some assistance.

Q Did that happen—

MR. McLEAN: Objection.

BY MISS WELLING:

Q When did that happen?

MR. McLEAN: Withdrawn.

THE WITNESS: Whenever she would call him.

MR. McLEAN: Objection, she is asking the specific question. If the witness doesn't know, please.

THE WITNESS: She called him in August. She called him in December about '77. These are times I am aware of that I was with her at the time. She wanted something for Christmas. He gave her money after Christmas. She was upset prior to and after.

BY MISS WELLING:

Q Will you describe exactly what you mean by upset?

A She would always be nervous before she would call him so I asked her did she want me to call him. She said no, I'll do it. She would take a deep breath, shake a while and then call. She was nervous.

[62] Q Did you ever take Tiffany to visit or see Mr. Jeter?

A I watched her and would take her with me past the shop. Him and I would talk. He would come outside and talk with me while my niece was there. I would let him see her. She was younger, when she was two or three or something. We would go to the bottom of the hill where the shop was.

Q That was somewhere you could walk to with Tiffany?

A Yes.

THE COURT: Keep your voice up.

BY MISS WELLING:

Q Miss Carter, why did you take Tiffany to see Mr. Jeter?

A My sister was afraid to take her on her own.

Q During what years were you taking Tiffany to see Mr. Jeter?

A When she started to walk, about a year after she started to walk until she was five or six. And then his shop wasn't there any longer. I had a change of jobs. I wasn't able to be with her for as much as when she was younger.

Q You said you were taking Tiffany because your sister was afraid to take Tiffany?

A Yes.

[63] MR. McLEAN: Objection, asked and answered.

THE COURT: Sustained.

BY MISS WELLING:

Q As to your testimony that you took Tiffany because your sister was afraid to, what did you observe that made you believe that your sister was afraid to take Tiffany?

A Just the way she would act. If I would say to her, why don't you take her down past the shop and let him see her because she is getting big. And she said oh no.

MR. McLEAN: Objection.

BY MISS WELLING:

Q When you would suggest to her that she take Tiffany down to the shop to see her, to see Mr. Jeter, what was her response, her reaction without saying what she said?

A I can't, she wouldn't, she would not.

Q From what you observed, what was her state of mind when she was saying that I can't?

A She would be in a nervous state, normal nervous state.

[64] Q Normal?

A When she would talk about Mr. Jeter, that was her normal state.

MISS WELLING: That's all I have.

CROSS-EXAMINATION

BY MR. McLEAN:

Q What is your current address?
A 304 Enright Court.
Q Do you work?
A Yes, I do.
Q Where do you work?
A Sears.
Q How often do you work there?
A Every day.
Q How long have you worked there?
A Ten years.

Q Have you worked there every day for ten years except for vacation?

A Except for days off and vacation.

Q Do you live with Cherlyn Clark?

A No. I don't.

Q Have you ever lived with Cherlyn Clark?

A When we were youngsters.

[65] Q Did you have a meeting with Miss Evelyn Welling yesterday with Miss Cherlyn Clark?

A No.

Q Have you been present in the courtroom during the testimony this morning of your sister?

A Yes, I have.

Q During the break, did you talk with your sister and Miss Welling in the hallway?

A Yes, I did.

Q Did the topic of the conversation concern your testimony?

A Not much of it.

MR. McLEAN: That's all I have of this witness.

THE COURT: Thank you, step down.

MISS WELLING: We rest.

MR. McLEAN: The defense calls the defendant.

GENE JETER,

Called as a witness herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McLEAN:

[66] Q State your name.

A Gene Jeter.

Q Mr. Jeter, you also have been present during this testimony this morning, haven't you?

A Yes, I have.

Q You are the defendant in this case?

A Yes, I am.

Q What is your address?

A 2050 Sunny Drive, Pittsburgh, Pa.

Q You have met with me on various occasions and discussed this case with me?

A Yes, I have.

Q Are you aware of an affidavit which Cherlyn Clark has filed in this case, a pleading in this matter, so I am not going to introduce it in evidence, which lists certain facts beginning prior to the birth of one Tiffany Clark in June 11, 1973?

A Am I aware?

Q Are you aware of that document?

A I am aware.

Q Mr. Jeter, number one, with respect to the testimony which you just heard of Miss Cherlyn Clark's sister, what can you tell the Court, if anything, regarding [67] these visits of Cherlyn Clark's sister and the subject child, Tiffany Clark, to your shop?

A That's not true.

Q Had she ever brought this child down?

A No.

Q With respect to other items, do you own a gun?

A No.

Q And have you ever owned a gun?

A No.

Q Do you carry a gun?

A No.

Q Have you ever carried a gun?

A No.

Q Why don't you carry a gun?

A I got no need for one.

Q With regard to Cherlyn Clark's testimony and Cherlyn Clark's sister's testimony, do you recall meetings that occurred at the sister's house?

A Yes.

Q What can you tell the Court about the invitation you received to that, for that meeting?

A Well, I was asked to come there to discuss support and that was it. I was asked to discuss support of [68] this child.

Q How long did that meeting last?

A Ten, fifteen minutes.

Q At that meeting, what, if anything, did you say regarding being the father of this child?

A I denied it.

Q Have you at all times prior to that denied it?

A Yes, I have.

Q What discussions if any did you have with Cherlyn Clark regarding your being the father of this child? Please be specific as the time and place.

A When I was told about it, the incident, we were supposed to have been in the car. When I was told about it, we had a, somewhat of a heated argument about it. I denied it at that time.

Q Why did you deny it?

A Because she was dating other people.

Q You have heard the testimony here regarding that initial incident. When I speak of the initial incident, I am speaking about when you were told of the pregnancy. You have heard the statements that were made here today that you physically took Cherlyn Clark and put her between the seats, straddled [69] her, choked her and said that you were going to fuck her up or fuck yourself up. What can you tell the Court about the occurrence of that?

A That never happened, for one thing, it never happened. As far as me saying the words she said, you know, I just said that, you know, she made the point of saying that I was the father of the baby after I told her that I didn't think I was and then I drove her back to wherever, I think her mother's house. That was the end of that.

Q Did you ever at any time touch Miss Clark?

A No.

Q At this incident?
A No.
Q Or thereafter?
A No. We had a heated conversation where she got upset and went to crying, that was it.
Q What about this alleged, this incident that Miss Clark testified to about milk money.
A I never sent any milk money.
Q Have you ever given Cherlyn Clark any money?
A At one time.
Q Would you tell the Court the circumstances?
[70] A At one time I had came into a little luck, and I had seen her on the day which I had more money than usual, I usually have in my pocket. She was talking about, I was asking her how was she doing and she talked about how bad she was doing, whatever. I had the money so I handed it to her as a friend.
Q When did this occur?
A I don't know, that had to be around '83, sometime like that. No, '81, somewhere back in there.
Q Mr. Jeter, do you know exactly when it occurred?
A I really don't know.
Q Mr. Jeter, if you don't know, would you please say you don't.
THE COURT: Before he ruins your case—
MR. McLEAN: Yes, Your Honor.
THE WITNESS: I really don't know. I can't recollect the time and dates.

BY MR. McLEAN:

Q Where in fact did it occur, do you know?
A We was on Watts Street.
Q What is near Watts Street?
A Watts and Wylie Avenue.
[71] Q Is there a school there?
A Yes.
THE COURT: Counsel, approach the bench, please.
(Thereupon, a discussion was held off record.)

BY MR. McLEAN:

Q Mr. Jeter, I have a few more question for you. Other than the one incident of you giving money did you ever give money to Cherlyn Clark?
A No.
Q Did you ever give money for the benefit and support of Tiffany Clark?
A No.
Q Have you ever acknowledged that you are the father either in writing or otherwise of Tiffany Clark?
A No.
Q Subsequent to 1973, did you ever see Cherlyn Clark in a condition that you would consider her to be afraid of you?
A No, because she lived at the neighborhood where I worked. I see her now and then, in coming and going. She never seemed to be afraid of me about anything.
MR. McLEAN: That's all I have.

[72] CROSS-EXAMINATION

BY MISS WELLING:

Q Mr. Jeter, you don't want to pay support for Tiffany Clark, do you?
A I don't want to pay for a child that is not mine.
Q You don't want to pay support for Tiffany Clark, do you?
A I don't want to pay for a child.
Q Would you answer the question?
THE COURT: Mr. Jeter, answer the question.
THE WITNESS: No.
MISS WELLING: That's all.
THE COURT: Thank you, you can sit down.

VITAL STATISTICS

CERTIFICATION OF BIRTH

DATE OF BIRTH (MO. DAY. YEAR. HOUR)	6-11-73 6:00 a.m.	FILE NO	5428-R
CITY, BOROUGH, OR TOWNSHIP OF BIRTH	PITTSBURGH	DATE FILED (MO. DAY. YEAR)	6-20-73
COUNTY OF BIRTH	ALLEGHENY	DATE ISSUED (MO. DAY. YEAR)	9-15-77

SUBJECT TIFFANY LYNN CLARK

SEX FEMALE

This is a true certification of name and birth facts on file in Vital Statistics, Pennsylvania Department of Health

Charles Harbester
CHARLES HARBESTER
STATE REGISTRAR

Leonard Bachman M.D.
LEONARD BACHMAN M.D.
SECRETARY OF HEALTH

COMMONWEALTH OF PENNSYLVANIA * DEPARTMENT OF HEALTH *

WARNING: IT IS ILLEGAL TO DUPLICATE THIS COPY BY PHOTOSTAT OR PHOTOGRAPH

(Fee for this certificate, $1.00)

WARNING: It is illegal to duplicate this copy by photostat or photograph.

No 190090

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH
VITAL STATISTICS

CERTIFICATION OF BIRTH

1. PLACE OF BIRTH
   County Allegheny
   Township
   Borough
   City Pittsburgh

File No. 185716-49

Date Filed 11-7 1949

2. Date of Birth 10-29 1949 (Month, day, year)

3. Name of Child Cheryle Lynn Clark

4. Sex Female

5. Name of Father Alfred Clark

6. Maiden Name of Mother Thelma Adams

This is to certify, that this is a correct certification of birth as filed in the Vital Statistics office Pennsylvania Department of Health, Harrisburg.

Thomas W. Leonard MD
Secretary of Health

NOV 21 1968

EXHIBIT 1

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EXHIBIT 2

PENNSYLVANIA CHILD SUPPORT PROGRAM
APPLICATION FOR
CHILD SUPPORT SERVICES

Record name Cherlyn Clark.

Record Number 425-28.

County 02.

District Hill.

Worker J. Zarzelzly.

Caseload Number 2122.

Date Applied for Assist. 8-16-78.

Name of Applicant Clark, Cherlyn.

Date of Birth 10-29-49.

Sex F.

Social Security Number 191-40-0555.

Address (Street, City, State, Zip Code) 2423 Bedford Ave., #375, Pgh. Pa. 15219

County Allegheny.

Phone Number 621-1930.

Name of Applicant's Employer None.

Relationship to Defendant Casual.

Relationship to Children Mother.

State name, date and place of birth, Social Security No. and residence of defendant's minor children.

Name of Child Tiffany Clark.

Birthdate 6-11-73.

Birthplace Pgh. Pa.

Social Security No. App. for.

Residence 2423 Bedford Pl. H.

Name of Defendant Jeter Gene.

Birthdate 1936.

Social Security No. Unknown.

Birthplace Washington, D.C.

Sex M.

Address (Street, City, State, Zip Code) 2400 Webster Ave., Pgh., Pa. 15219/County Allegheny

Name of Defendant's Employer Jeter's Barbershop.

Address (Street, City, State, Zip Code) Wylie Ave., Pgh., Pa.

Father's Full Name and Address Unknown.

Mother's Maiden Name Unknown.

Assistance Authorized for: (Indicate Individuals for Whom Defendant is Liable) Tiffany.

Amount Per Month $247.00 (83.00)

Existing Court Order: No

Date & Amount of Last Payment 6/78.

Amount 25.00.

/s/ John R. Hoffmann
JOHN R. HOFFMANN
Support Officer
8/17/78

/s/ Cherlyn Clark
CHERLYN CLARK
Applicant
8/17/78

EXHIBIT 3

Authorization to Change Beneficiary and to Pay Order and Arrearages to Commonwealth of Pennsylvania, Department of Public Welfare

Beneficiary Cherlyn Clark.

Co. Code 02.

Record Number 42528.

Cat. of Asst. C.

Grant Group C.

Defendant Gene Jeter.

County Allegheny.

District (If Applicable) Hill.

IN CONSIDERATION of the public assistance which has been granted, is being granted or which will be granted to the undersigned on behalf of the undersigned and/or on behalf of the defendant's child(ren), the Domestic Relations Division is authorized and requested to: (a) change the name of the beneficiary to Commonwealth of Pennsylvania, Department of Public Welfare, and (b) assign all arrearages owed under the Court Order, and to pay them, when collected, to the Commonwealth of Pennsylvania, Department of Public Welfare, (c) the undersigned waives no rights to bring an action for a support order or any modification thereof, but it is understood that the Department of Public Welfare is authorized to institute any action for support in the name of the undersigned and to request modifications of any orders made if the undersigned does not do so, and (d) if the undersigned participates in any hearing scheduled

by the court, the undersigned authorizes and requests the court to give prior notice of such hearing to the Department of Public Welfare.

In addition to the general provisions contained herein, it is intended that this authorization shall also act as the assignment required by Part D of Title IV, Section 456 of the Social Security Act, as amended on January 4, 1975, by Public Law 93-647, and that this authorization conform with the requirements of the act of June 24, 1937, P.L. 2045, Section 5, known as "The Support Law," as amended.

It is understood and agreed that:

(a) The amount collected by the Commonwealth of Pennsylvania, Department of Public Welfare shall not exceed the total sum of public assistance paid, calculated from the date of the filing of a petition for an order of support with the court:

(b) Upon termination of the payment of public assistance by, and upon receipt of written notice from the Commonwealth of Pennsylvania, Department of Public Welfare, the Domestic Relations Division will change the name of the beneficiary of the court order to the name of the original beneficiary, except that arrears which are owed under the order, on the date the payment of assistance is terminated shall continue to be paid to the Commonwealth of Pennsylvania, Department of Public Welfare, until such time as the Domestic Relations Division has been notified in writing by the Commonwealth of Pennsylvania that the claim against arrearages has been satisfied or withdrawn at the request of the parties or the court. The Department of Public Welfare will send a written statement of the amount due and owing under any court order to the parties of the court, and

(c) All payments made hereunder are to be forwarded by the Domestic Relations Division to the Bureau of Claim Settlement Area Office at:

Client: /s/ Cherlyn Clark
(Signature of Client)
8/16/78

Witness: /s/ J. Zarnegy
(Signature and Title of Staff Employe)
8/16/78

EXHIBIT 4

NOTICE OF SUPPORT REFERRAL

Instructions: Prepare and Distribute as Follows:

Original—Applicant

1st Copy Support Agent with 173-E Attached

2nd Copy CS Area (Control File)

3rd Copy—CAO Record

Case Name Cherlyn Clark.

County Allegheny.

District Hill.

Record No. 42528-C.

Caseload No. 2122.

As part of your application for assistance, you have signed over your rights to support against a legally responsible person. The assignment is required by Title IV-D of the Social Security Act as a condition of eligibility for assistance.

Section 432.6 of the Public Welfare Code (Act No. 202 of 1976) requires that every applicant for assistance, whose eligibility is based on deprivation due to absence of a parent from a home, must be referred for an interview with one of the Department's Support Officials.

IT IS A CONDITION OF YOUR CONTINUED ELIGIBILITY THAT YOU KEEP THE SCHEDULED APPOINTMENT WITH THE SUPPORT OFFICER. FAILURE TO KEEP THE SCHEDULED APPOINTMENT WILL RESULT IN THE COUNTY ASSIST-

ANCE OFFICE PROPOSING TO DISCONTINUE ASSISTANCE FOR YOU AND AUTHORIZING A PROTECTIVE PAYMENT FOR THE CHILD(REN).

Your interview is scheduled for Thurs—8/17, 1978, at 9:00 o'clock a.m., with a Support Officer from the Bureau of Claim Settlement Child Support Unit, at Hill County Assistance Office, 108 Smithfield St., Pgh., Pa. 15222 565-5444.

To help the interviewer, you should bring with you the following items if they are in your possession:

1. Social Security cards or numbers of all persons involved.
2. Birth Certificates of all persons involved.
3. Marriage Licenses or Certificates.
4. Divorce Papers.

Section 432.9 of the Public Welfare Code provides that the Department must maintain a Central Registry of absent parents, therefore, you should also bring the following items if they are in your possession:

5. Driver's Licenses and Owners Cards or Title Certificates.
6. Veterans or other Benefit Papers (disability, retirement, etc.).
7. Military Discharges of all persons involved.
8. Wage Statements or Pay stubs of all persons involved.
9. Mortgage payment book if buying a home.
10. Court documents of any kind (support order, etc.).

/s/ Joann C. Zarzeczny
JOANN C. ZARZECZNY
8/16/78

EXHIBIT 5

CHILD SUPPORT ACTION NOTICE

Instructions: CAO completes form in duplicate, retains copy and sends original to the child support unit of the area claim settlement office.

Co. Code 02.

Record No. 42,528.

Category C.

Grant Group C.

Dist. No. 2.

Record Name CLARK, Cherlyn.

Date Referred to Child Support Unit October 2, 1975.

Address 2435 Bedford Avenue, #375, Pittsburgh, PA 15219.

* * * *

Comments

Ms. Clark had named David Green as putative father of Tiffany on 10-2-75. On 8-16-78, Ms. Clark stated David Green was fictional, and putative father named as Gene Jeter. Cancel PA 173-E's of 10-2-75. New PA 173-E's signed for Gene Jeter.

* * * *

/s/ (Mrs.) Joann C. Zarzeczny
August 17, 1978

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

(Title Omitted in Printing)

OPINION

STRASSBURGER, J.

Plaintiff, Cherlyn Clark [Clark] brought this action seeking child support for her daughter, Tiffany Clark [Tiffany] against Defendant, Gene Jeter [Jeter].

To summarize, in 1971, Clark and Jeter began seeing each other. In September, 1972, Clark discovered she was pregnant and informed Jeter than he was the father. According to Clark, Jeter did not want this child and acted abusively towards her. According to Jeter, he denied that the child was his and engaged with Clark in a heated argument. The relationship between the parties thereafter ceased.

On June 11, 1973, Tiffany was born. One David Green was listed on the birth certificate as the child's father. The same name was given to the Pennsylvania Department of Public Welfare [DPW] when Clark applied for welfare in 1973. In August, 1978 Clark informed DPW that Green was in fact a fictitious name and that the real father was Jeter. Several documents were completed at that time including: an Application for Child Support Services; Authorization to Change Beneficiary and the Pay Order and Arrearages to Commonwealth of Pennsylvania, Department of Public Welfare; Notice of Support Referral; and Child Support Action Notice. However, no support complaint was filed against Jeter until September 22, 1983. Jeter filed an answer and new matter to the complaint which denied paternity and raised the statute of limitations. At 42 Pa. C.S.A. § 6704, the statute provides:

"(b) Limitation of actions—All actions or proceedings to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action or proceeding may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father."

Although Clark concedes that the action was commenced neither within six years of the child's birth nor within two years of the last reported "support" contribution, she argues that the statute of limitations is unconstitutional in that it treats illegitimate children differently than legitimate children. However, such an argument cannot prevail in light of *Astemborski v. Susmarski*, 499 Pa. 99, 451 A.2d 1012 (1982), *cert. granted, order vacated and remanded*, 103 S.Ct. 3105 (1983), *order reinstated*, 502 Pa. 409, 466 A.2d 1018 (1983), which upheld the statute in the following words, after the same equal protection challenge:

> "Since the statute is substantially related to a legitimate state interest, viz., the prevention of stale or fraudulent paternity claims, it is not constitutionally infirm under a Fourteenth Amendment challenge even though the statute may operate, at it has in this case, to deprive an illegitimate child of its right to make a claim for support beyond the six year limit." 466 A.2d at 1022

As alternative arguments, Clark contends that the statute of limitations should be tolled and/or that Jeter should be estopped to assert the statute due to threats made and duress exercised upon Clark. However, Clark's testimony indicates that any fear she may have had of Jeter, even if sufficient to toll the statute, lasted only a few years after the 1972 incident. There were at least six years after that period during which an action could have been filed.

Based on the facts and applicable law, this court finds that Clark's claim is barred by the statute of limitations. An order in accord with this opinion shall be entered.

STRASSBURGER, J.

July 8, 1985

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

(Title Omitted in Printing)

ORDER OF COURT

AND NOW, this 8th day of July, 1985, in accordance with the foregoing opinion, it is hereby ORDERED, ADJUDGED AND DECREED that Plaintiff's complaint for support be and the same is dismissed.

BY THE COURT:

/s/ Strassburger, J.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

No. 1040 Pittsburgh 1985

CHERLYN CLARK,
Appellant

v.

GENE JETER

ORDER

AND NOW, this 23rd day of OCTOBER, 1986, it is ordered as follows:

X Order affirmed.

BY THE COURT

/s/ [Illegible]
Deputy Prothonotary

IN THE SUPERIOR COURT OF PENNSYLVANIA

(Title Omitted in Printing)

Appeal from the order of the Court of Common Pleas,
Family Division, of Allegheny County,
Family No. 83-6955

Before: ROWLEY, WIEAND, and DEL SOLE, JJ.

OPINION OF THE COURT

Filed: October 23, 1986

BY ROWLEY, J.:

This is an appeal from an order dismissing appellant's complaint for support. Appellant, the natural mother of a child born on June 11, 1973, filed a support action on behalf of the child against appellee, the putative father of the child, in August, 1983, approximately two years and two months after appellee had last provided financial support for the child. Appellee filed an answer and new matter denying paternity and raising the six-year statute of limitations, 42 Pa.C.S. § 6704, as a defense. The trial court dismissed the petition because it was barred by the statute of limitations, because case law had held the statute to be constitutional, and because appellee engaged in no activity justifying the tolling of the statute of limitations.

Appellant has appealed from the order dismissing the action and argues: 1) that the trial court erred in concluding that the six year statute of limitations for support/paternity actions brought on behalf of children born out of wedlock does not violate the equal protection and due process clauses of the United States Constitution;[1] and 2) that the trial court erred in refusing to toll the statute of limitations based on appellee's abusive conduct towards appellant.

Following the filing of the appeal, the legislature enacted a new statute of limitations applicable to determinations of paternity relative to an action for support as follows:

> § 4343. Paternity.
>
> (b) Limitations of actions.—An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

Act of October 30, 1985, P.L. 66, Subchapter C § 4343 (b) ([to be codified at 23 Pa.C.S. § 4343(b)]. Appellant petitioned the Superior Court to remand the case to the trial court prior to the Superior Court's disposition of the aforementioned issues so that the trial court could decide the issue of the retroactivity of the new statute, for if the new statute is to be given retroactive application, then the arguments raised on appeal are moot. Appellant's petition to remand was denied. However, we will address the issue of whether the 18 year statute of limitations should be given retroactive effect.

I.

A.

The Statutory Construction Act of 1972, 1 Pa.C.S. § 1926, provides, "No statute shall be construed to be retroactive unless clearly and manifestly so intended by

[1] Appellant has provided no notice to the Attorney General of her constitutional challenge to the statute in violation of Pa.R.C.P. 235 and Pa.R.A.P. 512.

the General Assembly." The new 18 year statute of limitations itself makes no provision for retroactive application, but provides only that the act shall take effect in 90 days. 1985 Pa. Legislative Service #4, P.L. 66, § 4 p. 106. However, when the legislature wants to make a statute retroactive, it clearly and unambiguously does so. For example, when the legislature amended the act providing for Commonwealth Court jurisdiction, it included a clause stating that the act "shall take effect immediately and shall be retroactive to December 5, 1980." Section 404(1) of Act 1982, December 20, P.L. 1409, No. 326. Not only does the 18 year statute of limitations for paternity/support actions not include language suggesting that it was intended to be applied retroactively, but there is no legislative history to support retroactive application of the act. Therefore, we hold that the 18 year statute of limitations for paternity/support actions is not to be applied retroactively.

We find support for our conclusion in *Maycock v. Gravely Corporation*, —— Pa. Super. ——, 508 A.2d 330 (1986). In *Maycock*, 42 Pa.C.S. § 5533, which tolls the running of the statute of limitations for civil actions during minority, was held not to apply retroactively to a claim which had been barred under the previous statute of limitations in the absence of a clear intention of the legislature for the act to be retroactive. Although not identical to the new paternity/support statute of limitations, the statute of limitations involved in *Maycock* is similar in several material respects for determining retroactivity. Both statutes greatly expand the period during which a minor's cause of action can be brought; both conspicuously lack any indication that the legislature intended for them to be applied retroactively; and both provide a prospective effective date only. Therefore, just as the statute of limitations in *Maycock* is not retroactive, so too is the paternity/support statute of limitations not retroactive.

B.

Even if the statute were to be given retroactive effect, however, it could not revive appellant's cause of action and her complaint would still be time barred. Several courts of this Commonwealth have held that a retroactive statute of limitations can apply only to actions which have not been concluded or barred under the former statute. *Upper Montgomery Joint Authority v. Yerk*, 1 Pa. Cmwlth. 269, 274 A.2d 212 (1971). If the right to sue under the prior statute of limitations has not expired, then the new statute of limitations can be applied retroactively. *In re Condemnation of Real Estate by Carmichaels*, 88 Pa. Cmwlth. 541, 490 A.2d 30 (1985), interpreting *Seneca v. Yale and Towne Manufacturing Co.*, 142 Pa. Super. 470, 16 A.2d 754 (1940). However, once the right to sue has expired, no subsequent legislation can revive it. *Overmillar v. D.E. Horn and Co.*, 191 Pa. Super. 562, 159 A.2d 245 (1960).

In the instant case, the child was born in 1973, and the last voluntary support payment for the child from appellee was made in June, 1981, two years and two months prior to the filing of the complaint for support in August, 1983. The statute of limitations applicable when the Complaint was filed required the action to be commenced within six years of the birth of the child or within two years of the last written admission of paternity or voluntary payment of support. 42 Pa.C.S. § 5704(e). Thus appellant's cause of action expired in June 1983 when the child was ten years old and two years after appellee's last voluntary support payment. The new 18 year statute of limitations became effective in January, 1986, some two and one-half years after appellant's cause of action expired. Therefore, even retroactive application of the new 18 year statute of limitations would not affect appellant's rights.

II.

Having determined that the new statute of limitations shall not be applied retroactively and that even if it were applied retroactively, it would not remove the time bar on appellant's action, we now address the arguments raised by appellant as to why the six year statute of limitations should not be applied.

> The six year statute of limitations provides:
>
> (e) Limitation of actions.—All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgement by the reputed father.

42 Pa.C.S. § 6704(e). This act is included within the general provisions regarding support actions, and it applies only to an action to determine paternity brought pursuant to a support action. Therefore, it applies only to children born out of wedlock who must establish paternity prior to seeking support. It does not directly preclude all children from obtaining support after the six year period has run or after a putative father ceases to make voluntary support payments for two years, but only precludes children born out of wedlock from establishing paternity. However, because establishment of paternity is a prerequisite to a support order, the statute of limitations operates to deny children born out of wedlock the right to seek support long before they reach majority unless the child, through his guardian, has already had his paternity established.

Appellant argues that the six year statute of limitations deprives a child born out of wedlock the equal protection of the laws and therefore is unconstitutional. In *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed 2d 770 (1982), the Supreme Court held that the period during which support suits can be brought on behalf of illegitimate children must be sufficiently long to allow a reasonable opportunity for the claim to be brought and the limitation on such suits must be substantially related to the state's interest in avoiding the initiation of stale claims. In *Mills*, the court found a one year statute of limitations to deny equal protection; in *Pickett v. Brown*, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed. 2d 372 (1983), the court similarly found that a two year statute of limitations was unconstitutional. In *Astemborski v. Susmarski*, 502 Pa. 409, 466 A.2d 1018 (1983) the Pennsylvania Supreme Court held that in light of *Mills* and *Pickett*, the Pennsylvania six year statute of limitations on paternity/support actions for children born out of wedlock did not deny equal protection because six years provided ample opportunity for a support action to be brought after birth-related financial and emotional problems had subsided and because the state's interest in avoiding claims of paternity where the proof of paternity had become stale was substantially related to the six year statute of limitations.

Appellant recognizes that the Pennsylvania Supreme Court has held that the statute does not deny equal protection based upon *Mills* and *Pickett*. Appellant also recognizes that the Superior Court cannot overrule a decision of the Pennsylvania Supreme Court. *Commonwealth v. Edrington*, 317 Pa. Super. 545, 464 A.2d 456 (1983). However, appellant suggests that we should "carefully scrutinize the logic" utilized in *Astemborski* to uphold the statute.

Appellant argues that a six year statute of limitations in paternity actions is not substantially related to the state's purported interest in precluding paternity actions in which the proof is stale. If the state had a legitimate

and substantial interest in precluding paternity claims where the proof other than blood tests was non-existent or dimmed by the passage of time, then, appellant argues, the state would consistently place time limitations on all paternity determinations. However, the state has not done this. For example, the Probate, Estates and Fiduciaries Code includes no limitations on the time in which a child must establish paternity in order to inherit from the putative father. 20 Pa.C.S. 2107(c)(3). Thus, the state does not have a legitimate and substantial interest in limiting the time in which paternity actions for support must be brought, and the Pennsylvania statute does not satisfy the second requirement of *Mills*.

Further authority for this position is found in *State ex rel Adult and Family Services v. Bradley*, 295 Or. 216, 666 P.2d 249 (1983). In this case, the Supreme Court of Oregon held unconstitutional on equal protection grounds a six year statute of limitations on paternity actions for out-of-wedlock children. The court stated that the equal protection clause requires at a minimum that states refrain from totally precluding illegitimate children from exercising their rights for reasons of proof problems alone. *Jiminez v. Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974); *Mathews v. Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976); see also *Bradley, Id.*, at 253, n. 12. Therefore, any restraints on the rights of children born out of wedlock to establish paternity must relate specifically to problems of proof in establishing paternity. The court examined the Oregon statutes and found that the proof problem had been addressed by the provisions regarding the use of blood tests (O.R.S. 109.258) and by the requirement of evidence of paternity corroborating the mother's testimony. (O.R.S. 109.145). The court stated that "although proof of paternity in some cases may become difficult with the passage of time, that possibility does not condone the total preclusion of illegitimate children beyond a certain age from attempting to ascertain their father's identity," *Bradley, Id.*, at 254. Thus the court held that the six year statute of limitations denied equal protection, especially where a child could bring a paternity action up to ten years after the death of a parent to determine his right to inherit from the deceased putative father.

In *Astemborski*, the Pennsylvania Supreme Court did not consider that proof of paternity problems have been addressed by other Pennsylvania statutes such as 42 Pa. C.S. § 6136 which provides that blood tests can be conclusive as to paternity,[2] nor that the legislature has already expressed a lack of state interest in proof problems in paternity actions by placing no limitation on when a child must establish paternity in order to inherit by intestate succession. Similarly the court did not address the seeming inconsistency of limiting out of wedlock children's rights to support by allowing them to establish paternity only within six years of the date of birth or within two years of the last voluntary support payment, but to place no limitation on the putative parent's right to establish paternity at any time and thereafter seek enforcement of his parental rights. *See: In re Mengel*, 287 Pa. Super. 186, 429 A.2d 1162 (1981) (unwed putative father has standing to establish paternity through a petition for declaratory judgment.) Despite the logic of these considerations and their acceptance in developing case law, the Pennsylvania Supreme Court has thus far remained steadfast in its holding that the six year statute of limitations is constitutional. As an intermediate appellate court, we are bound by the decisions of the Supreme Court. Therefore,

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[2] Case law holds that blood tests are admissible as some evidence of paternity but are not conclusive. *Olson v. Dietz*, —— Pa. Super. ——, 500 A.2d 125 (1985); *Connell v. Connell*, 329 Pa. Super. 1, 477 A.2d 872 (1984); *Turek v. Hardy*, 312 Pa. Super. 158, 458 A.2d 562 (1983).

we hold that the six year statute of limitations, 42 Pa. C.S. § 6704(e), does not deny equal protection.

III.

Appellant also argues that the six year statute of limitations denies due process of law. Even though a child has a right to support throughout his minority, a child born out of wedlock can only sue to receive the support to which he is entitled by bringing an action within six years of birth or two years of the putative father's last voluntary support. Moreover, the statute, which limits when the action must be brought, requires that the complaint for support of a minor child be brought by the person having custody of the child. 20 Pa.C.S. § 6704(b). Thus, although it is the child's right to support, the child's custodian has exclusive control to exercise or not to exercise the child's right. By failing to commence an action for the child's support within the statute of limitations, the custodian can forfeit the child's right to ever receive support from the putative father. Therefore, appellant argues, the child is denied due process.

In some jurisdictions which have considered the due process argument against paternity statutes of limitations, the controlling issue has been whether the statute precludes the child's only avenue for enforcement of the parent's obligation for support. In some jurisdictions, the statutory procedure for obtaining support, to which the statute of limitations applies, is not the exclusive means of establishing paternity and support. *Kaur v. Singh Chawla*, 11 Wash. App. 362, 522 P.2d 1198 (1974) (to keep the statute of limitations from being declared unconstitutional, the court held that the statutory filiation procedures were not the exclusive means of securing the child's right to support); *Huss v. DeMott*, 215 Kan. 450, 524 P.2d 743 (1974) (a child has a common law cause of action separate from the statutory bastardy proceedings). And in some jurisdictions, the statute of limitations has been interpreted as applying only to the mother or guardian's right and not to the child's right. *Doak v. Milbaurer*, 216 Neb. 331, 343 N.W.2d 751 (1984); *Huss v. DeMott*, 215 Kan. 450, 524 P.2d 743 (1974).

The only procedure for bringing a paternity and support action in Pennsylvania is pursuant to the support statute. 42 Pa.C.S. § 6701 *et seq.* Yet under this statute, the child's custodian must bring the action and must do so while the child is still a minor. If the person who has custody of the child fails to file a complaint for support/paternity before the child is six years old, the child is foreclosed from seeking and obtaining support throughout the remainder of his minority even though, in theory, he has the right to support until he reaches majority.

It is the settled rule in Pennsylvania, "that it is not violative of any constitutional rights to hold minors bound equally with adults to the prescribed statutory periods within which legal causes of action may be brought." *Petri v. Smith*, 307 Pa. Super. 261, 453 A.2d 342 (1982); *Von Colln v. Pennsylvania Railroad Co.*, 367 Pa. 232, 80 A.2d 83 (1951). In *DeSantis v. Yaw*, 290 Pa. Super. 535, 434 A.2d 1273 (1981) a panel of the Superior Court seriously questioned the continuing validity of the Supreme Court's rule stating: "a chose in action is a form of personal property that without question now belongs to the injured child himself, and yet he is legally debarred from pursuing his claim." *Id.*, at 542, 434 A.2d at 1276. The Supreme Court has not re-addressed the issue of whether children who are held to be equally bound to statutes of limitations with adults are denied due process, and the Superior Court has been compelled to continue to follow the long-established rule. *Stein v. The Washington Hospital*, 302 Pa. Super. 124, 448 A.2d 558 (1982). Until the Supreme Court changes its rule, we are bound to follow it. Therefore, we hold

that the six year statute of limitations, 42 Pa.C.S. § 6704 (e), does not deny due process.

IV.

Appellant's final argument is that appellee should be equitably estopped from raising the statute of limitations as a defense because of his conduct towards her. Appellant avers that when she told appellee that she was pregnant with his child, he physically abused her and threatened her in order to prevent her from listing him as the child's father on the birth certificate. As found by the trial court, however, even if appellee did threaten and abuse appellant, this behavior lasted only a few years after 1972, and there were at least six years in which to have commenced the action after the abuse ceased. Therefore, we find no merit to this argument.

Order affirmed.

IN THE SUPERIOR COURT OF PENNSYLVANIA

(Title Omitted in Printing)

ORDER OF COURT

AND NOW, this 18th day of December, 1986, Appellant's Application for Reargument is denied.

Per Curiam

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

May 27, 1987

Evalynn B. Welling, Esquire
Eileen D. Yacknin, Esquire
Neighborhood Legal Services
1312 E. Carson St.
Pittsburgh, Pa. 15203

In Re: Cherlyn Clark v. Gene Jeter
No. 43 W. D. Allocatur Docket 1987

Dear Mses. Welling and Yacknin:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above matter:

"May 27, 1987
Petition Denied.
Per Curiam"

Very truly yours,

/s/ Irma T. Gardner
Deputy Prothonotary

ITG: cho
cc: Craig McKlean, Esq.
Hon. Leroy S. Zimmerman
Rose Palmer-Phelps, Director
Hon. Eugene Strassburger

SUPREME COURT OF THE UNITED STATES

No. 87-5565

CHERLYN CLARK,
Petitioner

v.

GENE JETER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA, PITTSBURGH OFFICE

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 11, 1988

No. 87-5565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHERLYN CLARK,

Petitioner,

v.

GENE JETER

Respondent.

On Writ Of Certiorari To The Superior Court of Pennsylvania

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Is Pennsylvania's current eighteen-year paternity statute of limitations, which has been construed to be not applicable to cases barred by the now repealed six-year statute but pending on appeal at the time of the enactment of the new statute, in conflict with the federal Child Support Enforcement Amendments?

2. Does a six-year statute of limitations for actions brought to establish paternity in support actions for children born out of wedlock while children born to married parents can seek support throughout their minority violate the equal protection guarantee of the Fourteenth Amendment to the United States Constitution?

3. Does foreclosing a child's continuing right to paternal support after six years because of his custodian's failure to file an action on his behalf deprive the child of the due process guaranteed by the Fourteenth Amendment of the United States Constitution?

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OPINIONS BELOW

Cherlyn Clark's complaint for support for her out-of-wedlock child was dismissed by the Court of Common Pleas, Allegheny County, Pennsylvania on July 8, 1985. (JA 72) An appeal was taken to the Pennsylvania Superior Court, and the trial court's decision was affirmed by order and panel decision dated October 23, 1986, and reported at 358 Pa. Super. 550, 518 A.2d 276 (1986). (JA 73-74) Thereafter the Superior Court denied Petitioner's Application for Reargument, *per curiam*, on December 18, 1986. (JA 85) On May 27, 1987, the Pennsylvania Supreme Court denied her Petition for Allowance of Appeal, also *per curiam*, ___ Pa. ___, 527 A.2d 533 (1987). (JA 86)

JURISDICTIONAL STATEMENT

The judgment of the Superior Court of Pennsylvania affirming the judgment of the lower court dismissing Cherlyn Clark's support complaint for her minor daughter as time-barred was entered October 23, 1986. This order was rendered by the highest court in the Commonwealth of Pennsylvania in which review of such an order could be had, 42 Pa. Cons. Stat. Ann. § 742. On May 27, 1987, the Supreme Court of Pennsylvania denied Petitioner's Petition for Allowance of Appeal. Petitioner moved this Honorable Court for an Extension of Time within which to file a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 2101(c). By order dated August 14, 1987, Justice William J. Brennan, Jr. granted Petitioner's motion and extended the filing date until September 24, 1987. The Petition for a Writ of Certiorari was filed within this period. The Petition for Writ of Certiorari was granted January 11, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

Section 1 of the Fourteenth Amendment to the Constitution of the United States

Article VI, Clause 2 of the Constitution of the United States

Statutory Provisions

42 U.S.C. § 666(a) and § 666(a)(5)

23 Pa. Cons. Stat. Ann. § 4343(b) (Purdon Supp. 1987)

42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1985) (repealed)

42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1982) (repealed)

42 Pa. Cons. Stat. Ann. § 6704(e) (Purdon Supp. 1980) (repealed)

42 Pa. Cons. Stat. Ann., Pa. R.Civ.P. 1910.7

42 Pa. Cons. Stat. Ann., Pa. R.Civ.P. 1910.15

(The verbatim texts of the constitutional and statutory provisions involved in this case are set forth in the Addendum to the Petitioner's Brief.)

STATEMENT OF THE CASE

On September 22, 1983, Petitioner Cherlyn Clark filed a support complaint in the Allegheny County Court of Common Pleas on behalf of her minor daughter, Tiffany Clark, who was born out of wedlock on June 11, 1973. (JA 4-6) In the complaint Cherlyn Clark alleged that Gene Jeter was the father of Tiffany. (JA 5) Blood tests were subsequently ordered by the court, (JA 7-8) and after the

tests failed to exclude Mr. Jeter as the possible father of Tiffany, a conciliation was scheduled with the court for February 16, 1984. (JA 9)

At the conciliation Mr. Jeter appeared with counsel and presented a Motion to Dismiss the Complaint and to Enter Judgment in Favor of the Defendant, in which he denied paternity and raised the six-year statute of limitations for paternity actions, 42 Pa. Cons. Stat. Ann. § 6704(e),[1] as a defense to Cherlyn Clark's action. (JA 10)

Cherlyn Clark subsequently filed an Answer to his motion and a motion of her own for judgment in her favor on the record therein. (JA 12-13) In her Answer, she asserted that the six-year statute of limitations violated her Fourteenth Amendment right to equal protection because the law permits marital children to sue for support until they are eighteen, but cuts off the rights of nonmarital children at six years. This is so because an illegitimate child must prove paternity before he can seek support, and is only permitted to commence a paternity proceeding within six years from birth or within two years after the most recent support payment, 42 Pa. Cons. Stat. Ann. § 6704(b). She also alleged a violation of due process because the illegitimate child's continuing

---

[1] 42 Pa.Cons. Stat. Ann. § 6704(e) (Purdon Supp. 1980), the six-year limitations section of Pennsylvania's support proceedings law applicable to children born out of wedlock was adopted in 1978 as part of Pennsylvania's change-over from criminal to civil support actions. The section was amended in 1982 and redesignated as 42 Pa.C.S. § 6704(b) (Purdon Supp. 1985). It was replaced by an 18-year statute of limitations effective January 1986. The trial court held that Cherlyn Clark's claim was time-barred by 42 Pa.C.S. § 6704(b); however, the Superior Court referred to 42 Pa.C.S. § 6704(e) in its decision. The two sections are essentially identical except that the phrase "or proceedings" has been added to § 6704(b).

right to support is forfeited by the actions or inactions of his mother before his sixth birthday.

Ms. Clark also alleged that the blood tests performed pursuant to the court's order showed a 99.93% probability that Mr. Jeter was Tiffany's father. (JA 13) In the affidavit which accompanied this motion, she alleged that Mr. Jeter assaulted her during her pregnancy, so that out of fear of him, she delayed filing for support until 1978. (JA 14-15) In that year, she filled out what she thought was a support complaint with a Department of Public Welfare support officer but was not informed by the Welfare Department until August 1983 that she needed to take the further step herself of filing a support complaint with the Common Pleas Court. (JA 3, 6, 15-16)

After a hearing on May 5, 1985, the trial court entered an order upholding the constitutionality of 42 Pa. Cons. Stat. Ann. § 6704(b) based on the holding of the Pennsylvania Supreme Court in *Astemborski* v. *Susmarski*, 499 Pa. 99, 451 A.2d 1012 (1982), *vacated* 103 S. Ct. 3105 (1983), *reinstated on remand* 502 Pa. 409, 466 A.2d 1018 (1983). (JA 69-72) The trial court also held that any fear that Ms. Clark may have had of Mr. Jeter lasted only a few years, so that "there were at least six years after that period during which an action could have been filed." (JA 70-71) Therefore, the trial court held Ms. Clark's claim to be barred by the statute of limitations. (JA 71)

Cherlyn Clark appealed to the Superior Court of Pennsylvania, again arguing that the statute of limitations contained in 42 Pa. Cons. Stat. Ann. § 6704 offends equal protection and due process. Her brief was filed on October 29, 1985, one day before the Pennsylvania Legislature enacted 23 Pa. Cons. Stat. Ann. § 4343(b), which provided for an eighteen-year statute of limitations in actions to

establish paternity. This statute was passed in response to the new federal law, 42 U.S.C. § 666(a)(5) which mandated all states participating in the federal child support program to adopt eighteen-year statutes of limitations in paternity actions.

On March 26, 1986, oral argument was scheduled on the case. On that same day this Honorable Court announced the per curiam decision in *Paulussen* v. *Herion*, 334 Pa. Super. 585, 483 A.2d 892 (1984), *prob. juris. noted* 474 U.S. 899 (1985), *vacated* 475 U.S. 557 (1986), *on remand* 359 Pa. Super. 520, 519 A.2d 473 (1986) in which this Court declined to consider an equal protection challenge to the six-year statute of limitations contained in § 6704 until Pennsylvania courts first determined the applicability of the new eighteen-year statute.

Shortly thereafter, on April 11, 1986, Cherlyn Clark filed in the Superior Court an Application for Permission to File an Application for Remand, asking the Superior Court to return the case to the trial court for consideration of the applicability of the eighteen-year statute of limitations to her case. (R ____)

The Superior Court did not rule upon her Application for Remand until October 23, 1986, when it denied her Application without opinion and decided the case. (JA 73-84) Reluctantly, the Superior Court held the six-year statute of limitations to be constitutional under the prior decisions of the Pennsylvania Supreme Court in *Astemborski* v. *Susmarski*, 502 Pa 409, 466 A.2d 1018 (1983) and *Von Colln* v. *Pennsylvania Railroad Co.*, 367 Pa. 232, 80 A.2d 83 (1951). The Superior Court also held, however, that the new eighteen-year statute could not be applied to revive cases which would have been previously barred by the running of the six-year statute. (JA 74-84)

Thereafter, Cherlyn Clark filed a Motion for Reargument with the Superior Court in which she alleged that, in analyzing the constitutionality of § 6704, the Superior Court had failed to consider changes in the law since *Astemborski*, *supra*, and also that the court had mistakenly held the eighteen-year statute not retroactive since the federal Child Support Enforcement Amendments required each state to implement "procedures which permit the establishment of paternity of any child at any time prior to such child's eighteenth birthday." (Application for Reargument, p. 3, R 85).

An order directing Gene Jeter to file an Answer to Cherlyn Clark's Motion for Reargument was entered by the Court on November 7, 1986. The Superior Court, however, denied the Motion for Reargument without opinion on December 18, 1986. (JA 85)

Next, Cherlyn Clark filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. In it she again alleged the violation of the Fourteenth Amendment rights to due process and equal protection by the application of the six-year statute of limitations to non-marital children. She also argued that the new eighteen-year statute of limitations had to be retroactive because "Pennsylvania must comply with the federally mandated eighteen-year statute of limitations in order to receive federal monies for Pennsylvania support enforcement programs." (Petition for Allowance of Appeal by Cherlyn Clark, Statement of the Questions Presented, #1). The Pennsylvania Supreme Court denied Cherlyn Clark's Petition for Allowance of Appeal without opinion May 27, 1987.

Cherlyn Clark thereafter filed in this Court a Petition for Certiorari to the Superior Court of Pennsylvania,

which was granted by this Honorable Court on January 11, 1988.

SUMMARY OF ARGUMENT

The unanimously adopted federal Child Support Enforcement Amendments of 1984 mandated the states to implement "procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday." To conform to this statutory requirement, Pennsylvania extended its statute of limitations in paternity/support proceedings for out-of-wedlock children, from six to eighteen years.

The plain, unambiguous language of the federal Amendments and the legislative history concerning their passage unmistakably reveal that Congress intended the states to apply this provision retroactively. Thus, the lower court's conclusion that Pennsylvania's new statute of limitations will not be applied retroactively in the case at bar impermissibly contravenes the federal statute.

Alternatively, Pennsylvania's six-year statute of limitations unconstitutionally infringes upon both the equal protection and due process guarantees of the Fourteenth Amendment to the United States Constitution. By cutting off the right of a child born out-or-wedlock to seek support from the child's father six years after the child's birth, while not similarly barring the right of a child born to married parents to seek such support, 42 Pa. Cons. Stat. Ann. § 6704(b) imposes a discrimination upon out-of-wedlock children which does not bear a substantial relationship to the state's stated interest in avoiding prosecution of stale or fraudulent claims. Therefore, 42 Pa. Cons. Stat. Ann. § 6704(b) unconstitutionally denies to out-of-wedlock children the equal protection of the laws guaran-

teed by the equal protection clause of the Fourteenth Amendment.

Furthermore, although all children in Pennsylvania are entitled to receive continuous financial support from their fathers through their minorities, this right is prematurely forfeited if the child's adult custodian or the caretaker-agency fails to initiate the appropriate action within the prescribed time limitations. Because those minor children are not afforded any opportunity to assert and prosecute their own claims for paternal financial support on their own behalf before or after 42 Pa. Cons. Stat. Ann. § 6704(b) forecloses their right to support, this six-year statute of limitations violates their due process protections guaranteed by the Fourteenth Amendment.

ARGUMENT

I. THE FEDERAL CHILD SUPPORT ENFORCEMENT AMENDMENTS WHICH MANDATE THAT STATES ALLOW PATERNITY ACTIONS TO BE BROUGHT UNTIL A CHILD'S EIGHTEENTH BIRTHDAY, REQUIRE REVERSAL OF THE LOWER COURT'S JUDGMENT.

In 1984, Congress unanimously passed the Child Support Enforcement Amendments of 1984, Pub.L. 98-378, 98 Stat. 1305 (1984), codified at 42 U.S.C. §§ 651 *et seq.* These Amendments require states participating in the Program for Aid to Families of Dependent Children (AFDC), Title IV, Part A of the Social Security Act, 42 U.S.C. §§ 602-615 (1982) to adopt certain procedures to strengthen and streamline support collection efforts. It is Cherlyn Clark's contention that the eighteen-year statute of limitations mandated by the Child Support Enforcement Amendments should have been applied to her complaint. If this Court so decides, the need to determine the

substantial equal protection and due process issues raised by the six-year statute of limitations can be avoided.

The eighteen-year statute of limitations in support/paternity actions was a keystone of the federal program and each state was required to adopt it in order to share in the federal funding for its state support program:

> 42 U.S.C. § 666. *Requirement of statutorily prescribed procedures to improve the effectiveness of child support enforcement*
>
> a) Types of procedures required:
>
> In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with the regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:
>
> * * *
>
> (5) *Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.* (emphasis added)

Since the language of this provision of the Amendments is clear and unambiguous, there is no opportunity for an alternative construction. As this Court has repeatedly held:

> Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.

Park 'N Fly, Inc. v. *Dallas Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). See also, *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Thus the Amendments require that Pennsylvania permit

paternity claims of all children, including Tiffany Clark, under the age of eighteen.

Furthermore, the legislative history underscores the clear language of the statute. In his remarks upon the passage of the Child Support Enforcement Amendments, Senator Robert Dole presented the following stark statistics:

> "According to the U.S. Census Bureau, more than 8.4 million women in 1981 were raising children whose fathers were absent; 30 percent of these women and children were living in poverty. Although most of the women should receive child support payments, obligations have been established on behalf of only 4 million of them."
>
> 130 Cong. Record. S-4802, April 25, 1984

These figures were reiterated many times in the comments of other senators and representatives. The clear Congressional concern here was for the women and children who *in the past* had not received support.[2] The Amendments were passed so that *in the future* these women and children would no longer be deprived of support.[3]

The Pennsylvania Legislature enacted its eighteen-year statute of limitations, 23 Pa. Cons. Stat. Ann. § 4343(b) (Purdon Supp. 1987) while Cherlyn Clark's case

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[2] Legislation is pending which would "clarify" that the 1984 Amendments' authority to establish paternity until age 18 includes actions previously dismissed under shorter statutes of limitations. H.R. 1720, H.R. Rep. No. 100-159, 100th Cong., 1st Sess. at 72 (1987).

[3] In Pennsylvania, an order of support is effective from the date of filing the support complaint, 42 Pa. Cons. Stat. Ann., Pa. R.Civ.P. 1910.17. Therefore a child receives support only back to the date of filing the support complaint.

was pending before the Pennsylvania Superior Court. It provides:

> *Limitation of Actions.*—An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of the birth of the child.

Section 4343(b) was part of a package of support program reforms passed to bring Pennsylvania into compliance with the federal Amendments and thereby prevent Pennsylvania from losing federal reimbursement funds provided for the support programs. Pennsylvania State Senator Greenleaf read a prepared statement into the record at the time the Legislature approved the State support program amendments, including 23 Pa. Cons. Stat. Ann. § 4343(b), emphasizing that the Act had been passed for "federal money and to better provide for our families," Pennsylvania Legislature Journal-Senate, October 9, 1985, at 1099.

Nevertheless in the within case the Pennsylvania Superior Court has held that 23 Pa. Cons. Stat. Ann. § 4343(b) does not apply to cases which were previously barred by the running of the six-year statute of limitations, *Clark* v. *Jeter*, 358 Pa. Super. 550, 518 A.2d 276 (1986), *alloc. den.* 527 A.2d 533 (Pa. 1987)[4]. The Pennsylvania Superior Court has reiterated this holding in the en banc remand decision in *Paulussen* v. *Herion*, 334 Pa. Super. 585, 483

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[4] This holding was in direct conflict with previous holdings of the Superior Court which found that the six-year statute of limitations enacted at 42 Pa. Cons. Stat. Ann. § 6704 was applicable to claims which had previously been barred by the running of the two-year statute of limitations. See *Williams* v. *Wolf* 297, Pa. Super. 270, 443 A.2d 831 (1982); *Commonwealth ex rel Lucretia Johnson* v. *King*, 297 Pa. Super. 431, 444 A.2d 108 (1982); *Jennis* v. *Stillman*, 306 Pa. Super. 431, 452 A.2d 801 (1982).

A.2d 892 (1984), *prob. juris. noted* 474 U.S. 899 (1985), *vacated* 475 U.S. 557 (1986), *on remand* 359 Pa. Super. 520, 519 A.2d 473 (1986).[5]

The federal government is free to establish conditions for participation in federally funded programs, *King* v. *Smith*, 392 U.S. 309 (1968). In other cases brought under the Social Security Act this Court has held that once a state voluntarily chooses to participate in a program under that Act, the state under the Supremacy Clause must comply with the federal statutory requirements and applicable regulations, *Townsend* v. *Swank*, 404 U.S. 282 (1971); see also, *Harris* v. *McKae*, 448 U.S. 297, 301 (1980).

The plain language, accompanying regulations, and legislative history of 42 U.S.C. § 666(a)(5) require that states adopt, at minimum, *retroactive* eighteen-year statutes of limitation for paternity actions. The statutory language is clear: *any* child at *any time* until his eighteenth birthday must be able to have his paternity established.

---

[5] *Paulussen*, *supra*, had been specifically remanded by this Court for the consideration of the effect of the new eighteen-year statute of limitations. While the Superior Court found the federal Act was the "motivating factor" for the state law, it mirrored the holding of *Clark* v. *Jeter*, *supra*, that Section 4343(b) does not apply to pending cases where the six-year limitations statute had already run before the longer statute was enacted. Furthermore, in *Young* v. *Hampton*, ____ A.2d ____ (No. 1195 Phila. 1987) the Pennsylvania Superior Court, citing *Clark* v. *Jeter*, *supra*, came to a similar conclusion in spite of the intervention of the Pennsylvania Department of Public Welfare, which argued that federal law required the retroactive application of the statute. (A copy of this very recent decision is attached to the Addendum to Petitioner's Brief).

The House of Representatives, in approving the Amendments, specifically stated:

> The bill provides that procedures under applicable state paternity laws must permit the establishment of an individual's paternity for any child until the child's eighteenth birthday . . . . States could eliminate statutes of limitation for establishing paternity altogether if they wished.
>
> H.R. Rep. No. 527, 98th Cong., 1st Sess. 1 (1983), at 38.

The Congressional intent to use this requirement to revive cases which might have been barred by shorter statutes in the various states was emphasized by Department of Health and Human Services (HHS) regulations implementing the Child Support Enforcement Amendments on May 9, 1985. In addressing comments that the regulations paid insufficient attention to existing state laws and procedures for the establishment of paternity, HHS took the following position:

> Since it is clear that cases previously considered closed because of the child's age will now have to be reopened and services provided, we saw no need to elaborate on this requirement. *Child Support Enforcement Program, Implementation of Child Enforcement Amendments of 1984*, 50 Fed. Reg. 90, 19608, 19631 (1985), comment to 45 C.F.R. § 302.70(a)(5).

HHS's position on this issue is entitled to substantial deference. See, e.g. *Connecticut Dept. of Income Maintenance* v. *Heckler*, 471 U.S. 524, (1985). Moreover, HHS's position is the only reasonable interpretation of the plain language of the Act and its legislative history.

Cherlyn Clark and her daughter were among the millions of women and children living without needed sup-

port in 1981 whom Congress clearly intended to help by the enactment of the Child Support Enforcement Amendments. Yet by operation of Pennsylvania law, the Amendments will do them no good. Section 4343(b) as construed by the Pennsylvania Superior Court is in direct conflict with the intent and language of the Child Support Enforcement Amendments, and thus must fall by virtue of the Supremacy Clause. The decision of the Pennsylvania Superior Court finding 23 Pa. Cons. Stat. Ann. § 4343(b) inapplicable to Cherlyn Clark's claim should be reversed.

The application of the eighteen-year statute of limitations mandated by the Child Support Enforcement Amendments of 1984 to Cherlyn Clark's case eliminates Gene Jeter's statute of limitations defense and thereby provides a statutory basis for a final resolution of this matter, thus avoiding the need to decide a constitutional question. *Crowell* v. *Benson*, 285 U.S. 22 (1932).

II. A STATUTE OF LIMITATIONS OF SIX YEARS FROM BIRTH IN AN ACTION FOR CHILD SUPPORT OF ILLEGITIMATE CHILDREN VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Pennsylvania support statute in effect when Cherlyn Clark filed a complaint for support on behalf of her ten-year old daughter, Tiffany, contained a six-year statute of limitations for paternity determinations. This provision has been consistently interpreted by the Pennsylvania Supreme Court to limit the period in which illegitimate children can initiate attempts to obtain support where paternity is contested.[6] Finding itself to be bound by

[6] *Astemborski* v. *Susmarski*, 499 Pa. 99, 451 A.2d 1012 (1982), *vacated* 462 U.S. 1127, *reinstated on remand*, 502 Pa. 409, 466 A.2d 1018 (1983); *Paulussen* v. *Herion*, 334 Pa. Super. 585, 483 A.2d 892 (1984), *prob. juris. noted* 474 U.S. 899 (1985), *vacated* 475 U.S. 557, *on remand* 359 Pa. Super. 520, 519 A.2d 473 (1986).

these holdings, the Pennsylvania Superior Court in *Clark* v. *Jeter*, 358 Pa. Super. 550, 518 A.2d 276 (1986), *alloc. den.* 527 A.2d 533 (Pa. 1987), reluctantly held that Cherlyn Clark's claim was time-barred. Legitimate children, however, are under no such constraint. Support may be sought for them during the entire period of their minority and beyond, even if their paternity is contested.[7] The question of whether this dissimilarity violates equal protection is now before this Honorable Court.

Inherent in the guarantee of equal protection of the law is the pledge to fairness and the promise that group classifications, where they exist, will be the result of rational decisions, not the mindless work of unarticulated prejudices. Because illegitimacy is beyond the individual's control and bears no relation to the individual's ability to participate in and contribute to society, and because illegitimate children have so often suffered for the conduct of their parents, this Court has through the years invalidated numerous state laws which disfavored children born out of wedlock.[8]

By these cases, it has been established that a classification based on illegitimacy is unconstitutional unless it has an evident and substantial relationship to a state interest, *United States* v. *Clark*, 445 U.S. 184, 191 (1980). Furthermore, such a classification may not "erect an impenetrable

[7] *Com ex rel. Stump* v. *Church*, 333 Pa. Super. 166, 481 A.2d 1358 (1984).

[8] See, e.g. *Reed* v. *Campbell*, ___ U.S. ___ 106 S.Ct. 2234 (1986); *Trimble* v. *Gordon*, 430 U.S. 762 (1977); *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973); *Gomez* v. *Perez*, 409 U.S. 535 (1973); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Glona* v. *American Guarantee Co.*, 391 U.S. 73 (1968); *Levy* v. *Louisiana*, 391 U.S. 68 (1968)

barrier to invidiously discriminate against illegitimate children by denying them substantial benefits generally accorded all children," *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973).

Applying these principles to statutes of limitations in paternity actions which circumscribe the child's right to pursue paternal support if he or she has been born out of wedlock, this Court has struck down a one-year statute and a two-year statute of limitations as violative of equal protection in *Mills* v. *Habluetzel*, 456 U.S. 91 (1982), and *Pickett* v. *Brown*, 462 U.S. 1 (1983).[9] The issues presented therein guide the analysis of the case at hand.

A. The State Allows Marital Children At Least Eighteen Years To File For Support, But Limits A Non-Marital Child To Six Years. This Violates Equal Protection And Cannot Be Justified As Necessary To Avoid Stale Claims Because Pennsylvania Permits Paternity To Be Established Without Time Limits In Many Non-Support Contexts Without Concern For Staleness.

In *Mills* v. *Habluetzel*, 456 U.S. 97, 98-99, this Court found a paternity statute of limitations must bear a substantial relationship to the legitimate state interest of avoiding stale and fraudulent claims. And indeed, the Pennsylvania Supreme Court has upheld Pennsylvania's six-year statute of limitations specifically on that ground, stating that "the state has a clear interest in having claims litigated while evidence remains available and fresh," *Astemborski* v. *Susmarski*, 466 A.2d at 1021.

[9] Many state courts both before and after *Mills* and *Pickett* have invalidated their statutes of limitations on equal protection grounds. See, for instance, *Patricia R.* v. *Peter W.*, 120 Misc. 2d 986, 466 N.Y.S.2d 994 (N.Y. Fam. Ct. 1983) (striking down five-year statute); *Alexander* v. *Commonwealth*, 708 S.W.2d 102 (Ky. 1986) (striking down four-year statute); *State Dep't of Health* v. *West*, 378 So. 2d 1220 (Fla. 1979) (same); *Smith* v. *Cornelius*, 665 S.W.2d 182 (Tex. Ct. App. 1984) (same); *Moore* v. *McNamara*, 40 Conn. Supp. 6, 478 A.2d 634 (1984) (striking down three-year statute); *State Dep't of Revenue* v. *Wilson*, 634 P.2d 172 (Mont. 1981) (same); *Lenoir ex rel. Cogdell* v. *Johnson*, 46 N.C. App. 182, 264 S.E.2d 816 (1980) (same); *Callison* v. *Callison*, 687 P.2d 106 (Okla. 1984) (same); *State ex rel. S.M.B.* v. *D.A.P.*, 168 W. Va. 455, 284 S.E.2d 912 (1981) (same).

However, both the unanimous decision of *Pickett* v. *Brown*, *supra*, and the concurring opinion by Justice O'Connor in *Mills* v. *Habluetzel*, *supra*, joined in relevant part by four Members of this Court, indicate that a state's announced motive of warding off stale claims is undermined if that state only limits the time in which paternity adjudications for support of out-of-wedlock children may be brought, yet still permits similar sorts of actions to proceed beyond those limits.

Pennsylvania permits paternity adjudications in many different contexts, but imposes a six-year statute of limitations only where support is sought for a non-marital child. For instance, the intestacy statute, 20 Pa.Cons. Stat. Ann. § 2107(c)(3), allows a court disposing of a decedent's estate to establish that a child born out of wedlock is the child of his father "if there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity." There is no set number of years after which Pennsylvania considers the evidence of birth too tenuous or the likelihood of fraudulent claims too great to permit determinations of paternity under this heirship statute.

One would assume that there are greater dangers of stale or fraudulent claims in cases where paternity is established after a man is dead and cannot testify about events of which he would have special knowledge than

where the man is alive and actively disputing paternity. Moreover, this statute operates in two directions: it permits children whose fathers have died to establish the identity of their fathers; it also allows fathers to claim kinship to deceased children for inheritance purposes.[10]

A father in Pennsylvania may also seek an affirmative judicial determination that he *is* a child's parent at any time, *In Re: Mengel*, 287 Pa. Super. 186, 195, 429 A.2d 1162, 1165 (1981). An unwed father has standing to bring such an action, *inter alia*, in order to preserve his inheritance rights or to contest the adoption of a child found to be his. Furthermore, a father can raise the issue of paternity in a suit to obtain visitation rights or to amend the child's birth certificate, *Id.* at 287 Pa. Super. 195, 429 A.2d 1167. In none of these actions is there a time limit set for the determination of paternity.

Moreover, the putative father of a marital child can deny his paternity as a defense to a support action brought at any time during the child's minority, provided that the putative father is not barred by laches or estoppel, *Commonwealth ex rel. Goldman* v. *Goldman*, 199 Pa. Super. 274, 184 A.2d 351 (1962). In such disputes, paternity can be decided many, many years after the birth of the child. In *Commonwealth ex rel. Gonzales* v. *Andreas*, 245 Pa. Super. 307, 313, 369 A.2d 416, 419 (1976), the Pennsylvania Superior Court specifically criticized the Uniform Act on Blood Tests to Determine Paternity (then

[10] Prior to 1978, 20 P.S. § 2107 provided that a child born out of wedlock would be considered the child of his mother but not his father in heirship proceedings. In the wake of *Trimble* v. *Gordon*, 430 U.S. 762 (1977), which invalidated a similar statute on equal protection grounds, the Pennsylvania probate law was changed to its current version in 1978.

codified at 28 P.S. § 307) because it did not "make any provision for a particular prescriptive period in which a putative father denying paternity must commence suit." When 28 P.S. § 307 was refashioned at 42 Pa. Cons. Stat. Ann. §§ 6131 *et seq.*, the Pennsylvania Legislature again refused to specify a limit on the period of time that a court can order blood tests to determine paternity.[11]

Since Pennsylvania permits paternity determinations without time limits in so many other kinds of cases, it seems absurd for the state to profess that a six-year statute of limitations is somehow necessary to avoid overly stale or false claims only in paternity actions brought by illegitimate children in the support context.[12] The recent passage of the eighteen-year statute of limitations by Pennsylvania is a further acknowledgement that

[11] The case of *Conneil* v. *Connell*, 329 Pa. Super. 1, 477 A.2d 872 (1984) illustrates such a situation. Shortly after separation Mrs. Connell sued her husband for support of their three children. Mr. Connell denied paternity and blood tests excluded him as a possible father for the boy Jeffrey. Seven years later, Mrs. Connell sued again for support for Jeffrey. Mr. Connell again denied paternity. More blood tests were performed with different results. After a hearing, the trial court decided the paternity issue against Mr. Connell, only two months before Jeffrey's twelfth birthday. The Pennsylvania Superior Court affirmed. Thus, because Jeffrey was a marital child, the court considered and decided his paternity, for the *second time*, many years after the time when an out of wedlock child would have been barred from having his father's identity established at all.

[12] In finding § 6704(e) constitutional, the Supreme Court of Pennsylvania ignored all of the above paternity adjudications and focused instead on the fact that in Pennsylvania, other causes of action were not tolled during minority, *Astemborski* v. *Susmarski*, 466 A.2d 1018, 1021 (Pa. 1983). However, in May 1984, 42 Pa.Cons. Stat. Ann. § 5533 was amended so that other causes of action are tolled during minority.

paternity claims are not too old to be tried fairly after six years.

This Court has subjected statutory classifications based on illegitimacy to a "heightened level of scrutiny," *Pickett* v. *Brown*, 462 U.S. at 8. However, even under a rational basis test, this inconsistency, coupled with the historically poor treatment of illegitimate children, certainly suggests that the real purpose of the statute is the impermissible intention to punish children because their parents have not married.

Such inconsistencies have triggered equal protection review of paternity statutes of limitation in other state courts. For instance in *State of Oregon Adult Family Services* v. *Bradley*, 295 Or. 216, 666 P.2d 249 (1983), the Oregon Supreme Court overturned a six-year statute of limitations in paternity actions in part because the state's stated reason for having the limit was undermined by the existence of an heirship statute that allowed the establishment of paternity after the death of the father, no matter how many years had passed since the birth of the child born out of wedlock.[13] This, of course, is a situation parallel to that presented by the Pennsylvania statutes.

B. The Efficacy Of Modern Blood Testing And The Protections Afforded Putative Fathers Remove Problems Of Litigating Delayed Paternity Claims, So That The Six-Year Limit Does Not Bear A Substantial Relationship To The Statutory Purpose Of Avoiding Stale Or Fraudulent Claims.

As this Court has previously concluded, "advances in blood testing have rendered more attenuated the rela-

[13] See also, *In Re: Patricia R.* v. *Peter W.*, 466 N.Y.S.2d 994, 120 Misc.2d 986 (Fam. Ct. 1983), where a five-year statute was invalidated in part because of the disparity between the paternity statute and the statute that tolls other actions during minority, and right of the state Commissioner of Social Services to bring suit within a longer period.

tionship between such statutes of limitations and the exclusion of stale or fraudulent claims. This is an appropriate consideration in determining whether a period of limitations governing paternity actions brought on behalf of illegitimate children is substantially related to a legitimate state interest," *Pickett* v. *Brown*, 462 U.S. at 17-18. In Pennsylvania, blood test results are admissible in a paternity adjudication as "some evidence of paternity" either affirmatively or defensively, *Turek* v. *Hardy*, 312 Pa. Super. 158, 458 A.2d 562 (1983). Both red blood cell and HLA tests are available at the request of a party, *Miller* v. *Kriner*, 341 Pa. Super. 293, 491 A.2d 270 (1985).

Turek v. *Hardy*, *supra* was decided in March 1983, the same year that Cherlyn Clark filed the support complaint for her daughter. Prior to *Turek*, blood tests were only used *before* trial to exclude putative fathers. The *Astemborski* court on remand in December 1983 suggests that once blood tests have failed to exclude "a male from the class of possible fathers, that male must rely on conventional forms of evidence as proof of non-paternity, viz. evidence of lack of access to the mother, as well as his own testimony and the testimony of others," *Astemborski* v. *Susmarski*, 502 Pa. 409, 416, 466 A.2d 1018, 1021. However, after *Turek*, this was no longer the case. Blood test results now can be an important part of a paternity trial. Indeed at a trial, where they do not exclude a man, but exhibit a relatively low probability that he is the father of a child, he will likely introduce the blood test results himself to his benefit.

In the instant case, HLA blood tests were ordered by the trial court. (JA 7-8) The results, which were reported back to the court, did not exclude Mr. Jeter (JA 9) and indeed were alleged to establish a likelihood of paternity of 99.93%. (JA 13) If this case were to go to trial, the

results of the blood tests would be admissible evidence along with other evidence.

As the Supreme Court of Connecticut recently concluded, the accuracy of combined HLA and blood grouping tests has led to similar affirmative use of blood tests as evidence in many jurisdictions precisely because of the ever-increasing precision of these procedures:

> We note that combined blood grouping and HLA testing has attained general acceptance in the scientific community as a means of testing for paternity. The American Medical Association, the American Blood Banking, and the American Association of Histocompatibility have all approved HLA testing to determine paternity. See *Haines* v. *Shanholtz*, 57 Md. App. 92, 100 [468 A.2d 1365] (1984). Moreover, while there is some disagreement among medicolegal commentators as to how inculpatory HLA test results should be presented to the fact finder in paternity cases, nearly all agree that such evidence is reliable and should be admitted in one form or another. *Commonwealth* v. *Beausoleil*, supra, 397 Mass. 215-16, 490 N.E.2d 788. It also appears that the decided trend in other jurisdictions is toward admission of HLA test results as evidence of paternity. See, e.g., *Cramer* v. *Morrison*, 88 Cal. App.3d 873, 153 Cal.Rptr. 865 (1979); *Carlyon* v. *Weeks*, 387 So.2d 465, 467 (Fla.App. 1980); *Crain* v. *Crain*, 104 Idaho 666, 662 P.2d 538 (1983); *Commonwealth* v. *Beausoleil*, supra; *Hennepin County Welfare Board* v. *Ayers*, 304 N.W.2d 879 (Minn. 1981); *Owens* v. *Bell*, 6 Ohio St.3d 46, 53, 451 N.E.2d 241 (1983).

Moore v. *McNamara*, 513 A.2d 660, 668 (Conn. 1986)

The recently developed technique of "DNA fingerprinting" promises to be an even more precise method of determining parentage.[14] This test is already being used for positive paternity identifications in the United Kingdom. See, "Methods and Applications of DNA Fingerprinting: A Guide for the Non-Scientist," Crim. L.R. 105 (1987).

Furthermore, the rights of putative fathers are well protected under Pennsylvania law. First, the defendant putative father has the right to demand a jury trial, 42 Pa. Cons. Stat. Ann., Pa.R.Civ.P. 1910.15(b). At the time of trial, his paternity must be proven by a preponderance of the evidence, 42 Pa. Cons. Stat. Ann., Pa.R.Civ.P. 1910.15(b). He has the right to demand blood tests for himself, the child, and the mother, 42 Pa. Cons. Stat. Ann. §§ 6131 *et seq*. In addition, under Pennsylvania law, paternity cannot be determined against the father on the basis of a default for failure to answer the complaint, 42 Pa. Cons. Stat. Ann., Pa.R.Civ.P. 1910.7. If he cannot afford the costs of blood tests, the state will pay, 42 Pa.Cons. Stat. Ann. § 6131 *et. seq.*; *Little* v. *Streater*, 452 U.S. 1 (1981). Once evidence of the results of the blood tests is admitted and he is excluded as a potential father, the case against him will be immediately dismissed, 42 Pa. Cons. Stat. Ann. §§ 6131 *et seq*.

The indigent putative father also has a right to counsel during the paternity action, *Corra* v. *Coll*, 305 Pa. Super. 179, 451 A.2d 480 (1982). A non-indigent putative father also must be given a reasonable opportunity to secure

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[14] News Notes, 13 Family Law Reporter 1567 (September 22, 1987). The high degree of accuracy of this test derives from matching genetic material obtained from blood or other body fluids. Because it is in that sense a "blood test," it should be available in paternity litigation under the Uniform Act on Blood Tests to Establish Paternity, 42 Pa. Cons. Stat. Ann. §§ 6131 *et. seq*. Cf. *Miller* v. *Kriner*, 341 Pa. Super. 293, 491 A.2d 270 (1985).

counsel for a paternity trial. The putative father also has the right to challenge the court finding on the basis of ineffective counsel, *Banks* v. *Randle*, 337 Pa. Super. 197, 486 A.2d 974 (1984). These procedural safeguards ensure that the putative father, once accused, will get a fair trial and thereby decrease his vulnerability to fraudulent claims.

C. The Six-Year Period Does Not Provide A Reasonable Opportunity For A Paternity/Support Suit To Be Brought For Non-Marital Children, While Marital Children Are Permitted To Bring Suit Throughout Their Minority. This Violates Equal Protection.

This Court has articulated a second requirement for statutes of limitation in paternity actions for children born out of wedlock—that "the period for obtaining paternal support has to be long enough to provide a reasonable opportunity for those with an interest in illegitimate children to bring suit on their behalf. . . ." *Pickett* v. *Brown*, 462 U.S. at 9; *Mills* v. *Habluetzel*, 456 U.S. at 99. Although the time period permitted by Pennsylvania is longer than that of the statutes struck down in *Mills* and *Pickett*, in important ways it is more restrictive because it permits *only* the person with custody of the child or an agency responsible for maintenance of the child to bring the action.[15] The Texas statute invalidated in *Mills* per-

[15] Prior to 1982, 42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1982) provided: "*Moving party.* A complaint may be filed by any person, including a minor spouse, to whom a duty of support is owing. It shall be filed on behalf of a minor child by the person having custody of the minor, without appointment as guardian ad litem. It may also be filed by any public body or public or private agency having any interest in the care, maintenance or assistance of any person to whom a duty of support is owing." This entire provision, almost verbatim, was moved in 1982 to Pa. R.Civ.P. 1910.3, 42 Pa. Cons. Stat. Ann. where it continued the practice under the prior statute.

mitted *any person* with an interest in the well-being of the child to file on his behalf, 456 U.S. at 100. The Tennessee statute struck down in *Pickett* allowed any other person besides the mother to file for the child if the child was on welfare or in danger of being on welfare. Also, this non-parent filer received the benefit of a longer (ten-year) statute of limitations.

The most obvious problem with Pennsylvania's statute is that, practically speaking, it excludes the child from the group of persons who are afforded an opportunity to establish his paternity. A child under six is too young to force his mother to file a complaint or to urge any other agency to act on his behalf. The mother may, for a thousand different reasons of love or fear, indifference or passion, wealth or poverty, neglect or choose not to pursue an action for the child. Her failure to act in the first six years will deprive the child of the support he needs each day of his minority thereafter and will thwart the child's developmental needs to have paternity established.[16] The six-year statute even prevents a later caretaker from establishing paternity afterwards if the mother has failed to do it in the first six years. Thus, limiting the child's rights to her mother's option can have a result which literally becomes an "impenetrable barrier" to the out-of-wedlock child's obtaining of support, where no such obstruction exists for the marital child.

[16] "Emotional and psychological well-being often depend upon a sense of identity and family history derived from the real father. Given the importance of the parent-child relationship to the future psychological and emotional health of the child, it is imperative to establish that relationship with the real father—not just any man capable of providing economic support," Richard Perna, "The Uniform Reciprocal Enforcement of Support Act and the Defense of Non-Paternity: A Functional Analysis," 73 Ky. L.J. 75, at 99 (1984-85).

For example, Cherlyn Clark testified that she was 21 when Tiffany was born. (JA 21) She said that she had been frightened of Gene Jeter's threats and so held off on filing for support for five years, hoping that things could be worked out so that he would help her support the child. (JA 33-34) Finally in August 1978, she decided to pursue support through the Welfare Department. She informed the Welfare Department that she believed Gene Jeter was Tiffany's father. She was referred to a support counselor who took information and filled out forms. (JA 35-36) Two of these forms had blank spaces for "Court Numbers." One of them contained an assignment of her rights against Gene Jeter and authorized the Department to sue him if she didn't. (JA 61-68)

Cherlyn Clark testified that she believed that the Welfare Department would file the suit for her. (JA 36) She kept inquiring of her caseworker during the ensuing years what had happened to her case. (JA 37) She testified that when a new welfare worker finally explained to her that she needed to file a complaint herself in court, she was already long past the statute of limitations. (JA 36-37)

As Justice O'Connor wrote in the concurring opinion in *Mills*, "the practical obstacles to filing suit in this one year after birth could as easily exist several years after the birth of the illegitimate child," 456 U.S. at 105. A mother of a non-marital child may also experience a host of other emotions, mishaps, or disabilities which prevent filing within six-years—as amply illustrated by Cherlyn Clark's story. Furthermore, as Justice O'Connor has also explained,

> The unwillingness of the mother to file a paternity action on behalf of her child, which could stem from her relationship with the natural father, or as the Court points out, from the emotional strain of having an illegitimate child, or even from the desire to avoid community and family disapproval, may continue years after the child is born . . . . The possibility of the unwillingness to file suit underscores that the mother's and child's interests are not congruent, and illustrates the unreasonableness of the Texas statute of limitations. 456 U.S., at 105 n.4.

It illustrates the unreasonableness of the Pennsylvania statute as well.

D. The Pennsylvania Courts Have Not Given Sufficient Weight To The Countervailing Interests Of The State.

The state has a strong interest in ensuring that genuine claims for support are satisfied as well as in removing children from the welfare rolls. As pointed out by Justice O'Connor in the *Mills* concurring opinion, this interest competes against any interest the state may have in avoiding stale and fraudulent claims, 456 U.S., at 103-104. Tiffany Clark has been supported by public assistance almost since birth. (JA 22-23) If Gene Jeter is her father, the existence of the statute of limitations has undoubtedly discouraged him from contributing to her upkeep or legitimizing her birth because to do so would put him within the exceptions to 42 Pa.Cons. Stat. Ann. §6704(b) and make him liable for continuing support. Thus, while §6704 discourages fathers from voluntary acts of parenting, it also shields them from orders to pay support by the premature snuffing out of the child's opportunity to press her rights. This, of course, may force the child onto welfare, which thwarts the fiscal interests of the state.

The Pennsylvania Superior Court in *Clark* v. *Jeter* was attentive to these considerations, yet held itself reluctantly bound by the decision of the Pennsylvania Supreme Court in *Astemborski* v. *Susmarski*, 502 Pa. 409, 466 A.2d 1018 (1983). The Pennsylvania Supreme Court in

Astemborski totally ignored all these issues. Like the unwise man in the Bible who "strained at a gnat but swallowed a camel," the Pennsylvania Supreme Court has been so concerned with the hypothetical injustice of successful stale claims that it has forgotten the real needs of the children who eat and grow, and the tangible tax burden created by maintaining children on welfare who could better be supported by their fathers.

The judgment of the Pennsylvania Superior Court should be reversed on equal protection grounds, insofar as it upholds the constitutionality of the six-year statute of limitations contained in 42 Pa. Cons. Stat. Ann. § 6704.

III. A STATUTE WHICH LIMITS THE TIME IN WHICH CUSTODIANS OF ILLEGITIMATE MINOR CHILDREN MAY SUE THE CHILDREN'S FATHERS FOR SUPPORT, WHILE BARRING THE MINOR CHILDREN FROM SUING ON THEIR OWN FOR SUCH SUPPORT, DEPRIVES THOSE MINOR CHILDREN OF THE DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In addition to its equal protection infirmity, Pennsylvania's six-year statute of limitations deprives minor children such as Tiffany Clark of their rights to seek and obtain the paternal financial support to which they are entitled contrary to the due process clause of the Fourteenth Amendment.

Pennsylvania's well-settled statutory and common law establishes that the minor children of Pennsylvania born both in and out of wedlock are owed an ongoing duty of support from their parents, throughout their minority, *Commonwealth* v. *Staub*, 461 Pa. 486, 337 A.2d 258 (1975); *Conway* v. *Dana*, 456 Pa. 536, 318 A.2d 324 (1974); *Commonwealth* v. *Dillworth*, 431 Pa. 479, 246 A.2d 859, 867 (1968) (Musmanno, Jr., dissenting):

> . . . the Common Law, as it gradually emerged from the cruelties, superstitions and illogicalities of medieval customs . . . decided to impose a financial responsibility on the bastard father . . . The child born in a house which did not display on its walls a framed marriage certificate had the right to demand that he be supported by the man responsible for his being brought into that house. This was a civil right, a natural right. . .

See also, *Gomez* v. *Perez*, 409 U.S. 535 (1973).

Despite an illegitimate child's legal entitlement to receive this paternal financial support for eighteen years, however, 42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1985) provides that the legal action to obtain it from the father must be commenced within six years of the birth of the out-of-wedlock child, or within two years of the putative father's last voluntary support. Moreover, Pennsylvania law requires that such lawsuit must be initiated, not by the minor child, but by either the person having custody of the child or an agency charged with caring for the child, 42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1982), repealed in 1982 but practice continued by Pa.R.Civ.P. 1910.3: "An Action shall be brought . . . (2) on behalf of a minor child by a person having custody of the minor, without appointment as guardian ad litem or (3) by a public body or public or private agency having an interest in the care, maintenance or assistance of a person to whom a duty of support is owing. . ."

Thus, although a minor child born out of wedlock possesses an independent right to paternal support, Pennsylvania law affords exclusive control to exercise or not to exercise the child's right to seek such support to the child's custodian or to an agency responsible for caring for such a

child.[17] Consequently, in cases such as that now before this Honorable Court, the custodial parent's failure to initiate a support action within the time prescribed by the challenged statute of limitations serves to foreclose forever the minor child's right to receive the continuing financial support which the father is legally obligated to provide. Such a result offends due process because it untenably divests the minor child affected in this case of her substantive entitlement to paternal support, without affording a meaningful opportunity to be heard, *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971).

This Court has frequently stressed the importance of familial bonds, both marital and otherwise. See *Stanley* v. *Illinois*, 405 U.S. 645 (1972). Furthermore, it has recognized that "both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination," *Little* v. *Streater*, 452 U.S. 1, 13 (1981). The risk that this interest will be erroneously denied is enormous where the child does not even have a right to come to court on his own to press his interest.

Finally, the state itself shares the interest of the child and the defendant in an accurate and just determination of paternity, *Little* v. *Streater*, 452 U.S. 1, 14. This interest is

[17] Although the Department of Public Welfare theoretically could initiate child support proceedings under this provision, the facts of Cherlyn Clark's case show how ineffective this provision is to protect the child's rights. This is especially true since the Department of Public Welfare must depend entirely upon the cooperation of the mother to identify the putative father and to participate in blood tests, trials, and other proceedings to establish paternity. If the mother is unwilling or unable to cooperate, any agency attempts to establish paternity will be easily thwarted. And, of course, the child who is not on welfare and is not being cared for by an agency will get no help whatsoever in protecting his rights through this provision.

in no way served by excluding the child from those able to bring a paternity action and by foreclosing his right to obtain support because of the failure of his custodian to file suit before he turns six. Moreover, the six-year statute is not necessary administratively to prevent stale or fraudulent claims. See Argument, Part II, *infra*.

Thus, the assessment of the interests of the private parties involved, the risk of erroneous deprivation of these interests through the Pennsylvania procedures used to determine paternity, and an analysis of the government's interests lead to the conclusion that due process is denied by shutting children out of available procedures to establish paternity and foreclosing their right to support because of their custodians' failures to bring suit within six years of birth. See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

The Pennsylvania Superior Court's rejection of the Petitioner's due process challenge to the constitutionality of 42 Pa. Cons. Stat. Ann. § 6704(b) conflicts with the conclusions of the courts of many other jurisdictions. Numerous states have recognized that a minor child's independent rights to obtain paternal support may not, under the Due Process Clause, be constitutionally foreclosed by a statute of limitations which truncates the custodial parent's right to initiate such a support action on behalf of the child.

For example, in finding a similar statute of limitations unconstitutional as violative of a minor child's due process guarantees, the Texas Court of Civil Appeals, in *In Re: Miller*, 605 S.W. 2d 332 (Tex. Civ. App. 1980), *aff'd on other grounds sub nom. In Re J.A.M.*, 631 S.W.2d 730 (Tex. 1982), stated at 336:

> . . . To hold otherwise would allow the illegitimate's right to support to be waived by the mother.

> Not only would this result in unequal protection under the law . . . but *such a denial would violate the illegitimate's constitutional rights to due process* . . . the law does not permit one to forfeit another's rights. *The rights of an illegitimate child to assert a claim for patental support is too fundamental to permit its forfeiture by the mother's failure to timely institute a filiation proceeding.* (emphasis added)

Likewise, in *State Dept. of Revenue* v. *Wilson*, 634 P.2d 172 (Mont. 1981), the Supreme Court of Montana held that a three-year statute of limitations as applied to prevent an illegitimate child, through a guardian, guardian ad litem, or next friend, from seeking paternal support would unconstitutionally deny the child due process, "The rights of the child cannot be so compromised during its infancy. The child born out of wedlock cannot be barred access to our courts during infancy," 634 P.2d at 174.

In a number of jurisdictions, minor children born out of wedlock have been held to possess a common law right of action separate from, and longer than, that statutorily afforded to the children's custodian—precisely to avoid the due process problems raised in the instant case. See *Spada* v. *Pauley*, 149 Mich. App. 196, 385 N.W.2d 746, *aff'd mem.*, 425 Mich. 1203, 389 N.W.2d 85 (1986):

> . . . we believe that Michigan's statutory scheme, which [due to the limitations period] denies the present plaintiff a cause of action, unreasonably restricts an illegitimate child's right to obtain parental support. Therefore, an illegitimate child may maintain an independent cause of action.

See also, *Bertie-Hertford Child Support Enforcement Agency ex rel. Souza* v. *Barnes*, 80 N.C. App. 552, 342 S.E.2d 579 (1986); *Payne* v. *Prince George's County Dept. of Social Services*, 67 Md. App. 327, 507 A.2d 641 (1986); *Nettles* v. *Beckley*, 32 Wash. App. 606, 648 P.2d 508 (1982); *Johnson* v. *Norman*, 66 Ohio St.2d 186, 421 N.E.2d 124

(1981); *Dozier* v. *Veasley*, 272 Ark. 210, 613 S.W.2d 93 (1981); *Kaur* v. *Singh Chawla*, 11 Wash. App. 362, 522 P.2d 1198 (1974); *Huss* v. *DeMott*, 215 Kan. 450, 524 P.2d 743 (1974); *Department of Economic Sec.* v. *Shanklin*, 514 S.W.2d 682 (Ky. 1974); *Commonwealth* v. *Mondano*, 352 Mass. 260, 225 N.E.2d 318 (1967); *In Re R.W.L.: W.R.W.* v. *Bartholomew*, 116 Wis. 2d 150, 341 N.W.2d 682, 687 (1984):

> . . . we also erred in holding . . . that the . . . statutory procedure is the child's exclusive remedy for establishing paternity and constitutes a bar to the child's obtaining a judicial forum in his or her own right on the paternity issue. *Such an interpretation renders the . . . statutory procedure unconstitutional . . . because it did not afford the child 'a day in court' to litigate a legislatively recognized right.* (emphasis added)

In other jurisdictions, some paternity/support statutes of limitations shorter than that at issue in the instant case have been upheld because they barred *only* the rights of the adult—not the rights of the minor child—to file suit beyond the statutory limit; *e.g.*, *Doak* v. *Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984), where the Nebraska Supreme Court, on that basis alone, held that a four-year statute of limitations did not constitutionally intrude upon the minor child's due process rights.

Moreover, since this Honorable Court's ruling in *Gomez* v. *Perez*, 409 U.S. 535 (1973), a growing majority of states have enacted civil paternity statutes which either prescribed no time limit at all to any cause of action to establish paternity,[18] or, while applying the pertinent

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[18] As of 1983, seven of the forty-four states which had enacted civil paternity statutes chose not to prescribe a limitations period for filing the action. Moreover, none of the six states which continued to rely,

limitations period to the mother's cause of action, expressly precluded its application to the child's cause of action.[19] The foregoing modifications of state law and the conclusions reached by the courts in the above-cited, and numerous other jurisdictions, reflect the "developing consensus at the state and federal levels, i.e., that the right of a child, legitimate or illegitimate, to be supported by his natural father lies in the child and an action therefor need not be brought by some intermediary party acting on his behalf—a party, that is, whose interest might conflict with that of the child," *Williams* v. *Alabama*, 504 So.2d 282, 283 (Ala. App. 1986), *cert. denied*, No. 85-1427 (Ala. 1987).[20]

As several state courts aptly have recognized, a mother's interests in initiating a paternity/support action

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instead, on criminal non-support statutes to determine paternity of out-of-wedlock children, provided for a statute of limitations pursuant to those laws. Wells, C., *Statutes of Limitations in Paternity Proceedings: Barring An "Illegitimate's" Right to Support*, 32 Amer. U.L.R. 567, 577 (1983).

[19] As of July 1985, at least twenty-seven state civil paternity statutes had either specifically excepted the minor child's own cause of action from the statute of limitations incorporated within those laws, or allowed for eighteen-year limitations periods. *Op. cit.*, 577, 578. See, also, *Record of Passage of Uniform Acts (Uniform Parentage Act)*, Am. Jur. 2d Desk Book, Item No. 124. "State Legislation on Child Support and Paternity," Tenn. B. J., Jan/Feb 1986, 20-21.

[20] See also, the Uniform Parentage Act, § 7, 9B U.L.A., which, while limiting the rights of anyone other than the out-of-wedlock child to bring a paternity action within three years of the child's birth, allows an action "brought by or on behalf of [the] child" to be brought until three years after the child reaches the age of majority. As of 1987, sixteen states had adopted, or substantially adopted, this Act, *Record of Passage of Uniform Acts (Uniform Parentage Act)*, Am. Jur.2d Desk Book, Item No. 124.

are neither necessarily identical to the illegitimate child's interests, nor are they likely to be sufficiently similar to afford the child a forum to protect his or her independent interests, *Spada* v. *Pauley*, 385 N.W.2d at 750; *In Re R.W.L.*, 341 N.W.2d at 686; *Johnson* v. *Norman*, 421 N.E.2d at 127.

A mother may fail to commence timely paternity proceedings for a variety of reasons: she may have a continuing relation with or affection for the father; she may wish to avoid any contact with the father; she may wish to avoid the disapproval of her family or community; she may be able to support the child and not foresee a change in her circumstances; she may be subject to the emotional strain and confusion that often attend the birth of an illegitimate child and continue for a prolonged period, *Pickett* v. *Brown*, 462 U.S. at 12-13; *Mills* v. *Habluetzel*, 456 U.S. at 105-106 (O'Connor, J., concurring); *Spada*, *loc. cit.*; *In re R.W.L.*, *loc. cit.*

In contrast, it is difficult to hypothesize a situation where a minor child would not have a substantial interest in seeking and obtaining, to the extent possible, paternal financial support for the child's healthy and happy upbringing, education, and training. *Cf.*, *Kaur* v. *Singh*, 522 P.2d at 1198 n.1, "When minor children are involved, the state's interest is that, in so far as is possible, provision shall be made for their support, education, and training, to the end that they may grow up to be worthy and useful citizens (citation omitted)."

Moreover, "[a] child's interests [in paternity/support] litigation are much broader," than those of the mother, *Spada* v. *Pauley*, 385 N.W.2d at 750, because the exercise of those rights, or the failure to do so, might not only additionally affect a child's future rights to Social Security

benefits and inheritances, but a child's sense of self-identity, heritage, and esteem. Cf., Note 16, *supra*.

Finally, there can be no quarrel that a father's duty to provide child support, under Pennsylvania law, is ongoing and continuous throughout the child's minority, *Commonwealth* v. *Staub*, 461 Pa. 486, 337 A.2d 258 (1975); *Commonwealth* v. *Dana*, 456 Pa. 536, 318 A.2d 324 (1974). Thus, a father's breach of that duty must likewise be deemed ongoing and continuing in nature, *M.A.D.* v. *P.R.*, 277 N.W.2d 27 (Minn. 1979), so that each day that the father fails to support his child, a new cause of action arises. See, *South Carolina Dept. of Social Services* v. *Lowman*, 269 S.C. 41, 236 S.E.2d 194, 196 (1977) ("New causes of action arise over the years with each instance of a putative father's failure to support his child"); *State Dept. of Health and Rehabilitative Services* v. *West*, 378 So.2d 1220, 1228 (Fla. 1979) (". . . since the duty of support continues throughout the minority of the child, new causes of action are being created each day that the natural father does not provide support.")

Pennsylvania law and the Pennsylvania courts have nevertheless persisted in foreclosing to out-of-wedlock children all opportunity to seek and obtain the ongoing paternal support to which they are entitled. The state has deprived those children of any access to the legal process available and necessary in order to secure their rights if, for whatever reasons entirely beyond the children's capacity to control, their mothers have failed to commence a paternity/support action within six years.

Thus, the Pennsylvania's six-year statute of limitations "operates to deprive [a minor child such as Tiffany Clark] of a protected right although its general validity as a measure enacted in the legitimate exercise of state power

is beyond question," *Boddie* v. *Connecticut*, 401 U.S. at 379, because ". . . it operates to foreclose [her] opportunity to be heard," *Id.*, at 380; *Little* v. *Streater*, 452 U.S. at 17. Surely, such an outcome utterly fails to satisfy "the requirement of fundamental fairness expressed by the Due Process Clause (citations omitted)," *Little* v. *Streater*, *loc. cit.*

Insofar as 42 Pa. Cons. Stat. Ann. § 6704(b) compels such a constitutionally unacceptable result, that portion of the Pennsylvania Support Proceedings Act must be held unconstitutional.

CONCLUSION

For all the foregoing reasons, the judgment of the Superior Court of Pennsylvania, which affirmed the trial court's dismissal of the Petitioner's complaint for support, should be reversed, and the case remanded for further proceedings consistent with the decision of this Court.

Respectfull submitted,

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ADDENDUM

ADDENDUM

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the Constitution of the United States:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 666(a) and § 666(a)(5):

> 42 U.S.C. § 666. *Requirement of statutorily prescribed procedures to improve the effectiveness of child support enforcement*
>
> a) Type of procedures required:
>
> In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with the regulations of the Secretary, to increase the efiectiveness of the program which the State administers under this part:
>
> * * *
>
> (5) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.

23 Pa. Cons. Stat. Ann. § 4343(b) (Purdon Supp. 1987):

> (b) *Limitation of actions*—An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1985) (repealed):

> (b) *Limitation of actions*—All actions or proceedings to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action or proceeding may be commenced at any time within two years of such contribution or acknowledgement by the reputed father.

42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1982) (repealed):

> *Moving Party.* A complaint may be filed by any person, including a minor spouse, to whom a duty of support is owing. It shall be filed on behalf of a minor child by the person having custody of the minor, without appointment as guardian ad litem. It may also be filed by any public body or public or private agency having any interest in the care, maintenance or assistance of any person to whom a duty of support is owing.

42 Pa. Cons. Stat. Ann. § 6704(e) (Purdon Supp. 1980) (repealed):

> (e) *Limitation of actions*—All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgement by the reputed father.

42 Pa. Cons. Stat. Ann., Pa.R.Civ.P. 1910.7:

> *No Pleading by Defendant Required. Question of Jurisdiction or Venue or Statute of Limitations in Paternity*
>
> (a) No pleading by the defendant shall be required, but if defendant elects to file a pleading, the domestic relations office conference required by the order of court shall not be delayed.
>
> (b) If defendant raises a question of jurisdiction or venue or in paternity cases the defense of the statute of limitations, the court shall promptly dispose of the question and may, in an appropriate case, stay the domestic relations office conference.

42 Pa. Cons. Stat. Ann., Pa.R.Civ.P. 1910.15:

> *Paternity*
>
> (a) If the action seeks support for a child born out of wedlock and the reputed father is named as defendant, the defendant may acknowledge paternity in a verified writing substantially in the form provided by Rule 1910.28(a). In that event the action shall proceed as in other actions for support.
>
> (b) If the reputed father does not execute an acknowledgment of paternity, the domestic relations officer shall terminate the conference. He shall advise the parties that there will be a trial without jury on the issue of paternity unless within ten days after the conference either party demands a trial by jury as provided by Rule 1910.28(b).
>
> *NOTE:* See § 6131 of the Judicial Code, 42 Pa.C.S. § 6131 et seq. for the Uniform Act on Blood Tests to Determine Paternity

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 01195 Philadelphia 1987

JOYCE YOUNG, *Appellant*
v.
HAROLD E. HAMPTON, *Appellee*

Appeal from the Order entered March 18, 1987 in the Court of Common Pleas of Northhampton County, Civil No. D.R. 128286

FILED JAN 27 1988

BEFORE: MCEWEN, MONTEMURO and KELLY, JJ.

MEMORANDUM:

This appeal has been taken from an order which dismissed a paternity action instituted by appellant on the ground that the action was time barred. Application of the relevant law to the facts of this case establishes that the learned Judge Richard D. Grifo properly dismissed the action. We, therefore, affirm.

On November 20, 1982, appellant commenced a paternity action against appellee seeking child support for her two minor children, 42 Pa.C.S. §6701 *et. seq.*.[1] Appellant alleged that appellee was the father of her son Davin, born on February 23, 1975, and her daughter Kiara, born on August 2, 1976. Appellee filed preliminary objections to appellant's petition asserting that the action was time barred by the six year statute of limitations, 42 Pa.C.S. §6704(e). The hearing court entered an order which sustained appellee's preliminary objections and dismissed appellant's complaint after concluding

[1]Repealed, October 30, 1985, P.L. 264, No. 66, §3, effective in 90 days.

that, since appellant had failed to commence the action within six years of the birth of either child, the action was time barred.

Subsequently, the Pennsylvania legislature enlarged the six year limitations period in which a paternity action could be commenced to eighteen years, effective January 28, 1986. *See:* Pa.C.S. §4343(e).[2] Passage of the new statute of limitations prompted appellant to initiate a subsequent action in paternity[3] against appellee on August 4, 1986, seeking a prospective order for child support. The hearing court determined, however, that this action was also barred as a result of the expiration of the previously applicable six year statute of limitations and, therefore, dismissed appellant's complaint. This timely appeal followed.

Appellant contends that it was error for the hearing court to dismiss her complaint, asserting that the new eighteen year statute of limitations permits her to pursue an action for paternity against appellee on behalf of her son until February 23, 1993, and on behalf of her daughter until August 2, 1994, and, therefore, her complaint, which was filed on August 4, 1986, was timely. We are constrained to reject this assertion as meritless as the distinguished Judge Richard D. Griffo properly determined that the decision of this Court in *Clark* v. *Jeter*,

[2]The eighteen year statute of limitations was enacted by our legislature in response to the Federal Child Support Enforcement Act of 1984, 42 U.S.C. §666, which requires states to adopt procedures which permit the establishment of paternity of any child at any time prior to the child's 18th birthday. *See:* 42 U.S.C. §1666(a)(5).

[3]This action was commenced pursuant to 23 Pa.C.S. §14343.

358 Pa.Super. 550, 518 A.2d 276 (1986) *allocatur denied* ___ Pa. ___, 527 A.2d 533 (1987) is controlling.

Accordingly, the order entered March 18, 1987, is affirmed.[4]

Order affirmed.

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[4]However difficult it may be to reconcile the holding of *Clark* v. *Jeter*, supra, with language contained in *Paulussen* v. *Herion*, 359 Pa. Super. 520, ___, 519 A.2d 473, 475 (1986), *Commonwealth ex rel. Pugh* v. *Callahan*, 312 Pa.Super. 246, and n.5, 458 A.2d 607, 609 and n.5 (1983), and *Williams* v. *Wolfe*, 297 Pa.Super. 270, ___, 443 A.2d 831, 835 (1982), it is clear that *Clark* v. *Jeter*, supra, sets forth the law of this Commonwealth.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 01195 Philadelphia 1987

JOYCE YOUNG, *Appellant*
v.
HAROLD E. HAMPTON, *Appellee*

JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Northampton County be, and the same is hereby Affirmed.

BY THE COURT:

/s/ _____
Prothonotary

Dated January 27, 1988

(1)

No. 87-1648

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHERLYN CLARK,

Petitioner,

v.

GENE JETER,

Respondent.

On Writ of Certiorari to the
Superior Court of Pennsylvania

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

I. Was the Pennsylvania appellate court correct when it refused to give retroactive application to a Pennsylvania statute to revive a cause of action time-barred by final judgment before the enactment of the statute?

II. Did the six year statute of limitations for paternity claims provide illegitimate children a bona fide opportunity to parental support?

III. Does a six year statute of limitations withstand attack on due process grounds if it provides a reasonable opportunity for instituting a cause of action to establish paternity?

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STATEMENT OF THE CASE

On June 11, 1973, Tiffany Clark was born to the petitioner, Cheryl Clark, then twenty-three years old. (Clark) (JA 4 and 5) David Green was listed on the birth certificate as Tiffany's father. (JA 29) In the same year, Clark sought support for herself and Tiffany and advised the Department of Public Welfare of the Commonwealth of Pennsylvania that Green was Tiffany's father. (JA 30)

On September 22, 1983, more than ten years after Tiffany's birth, Clark formally accused Gene Jeter (Jeter) of being the father of Tiffany. (JA 18) When, in 1983, Clark filed her formal Complaint against Jeter, the applicable procedures of the Allegheny County Court of Common Pleas, Family Division, were followed: A counselor scheduled a conciliation conference for October 5, 1983. At that time, in his first opportunity to defend himself, Jeter, without counsel, denied the charges. Because of Jeter's denial of paternity, the counselor scheduled blood tests after which another conciliation conference was scheduled. (JA 4-9) Jeter filed a motion to dismiss and an affidavit in support of the motion. He asserted that the action was filed ten years after the birth of the child and was barred by the then applicable statute of limitations of six years. In the affidavit, he again denied paternity. (JA 10-11)

Clark filed an answer to the motion to dismiss in which she asserted that 42 Pa. C.S.A. §6704(e) was unconstitutional as it violated her and her daughter's rights to "equal protection and due process guaranteed to them by the Fourteenth Amendment of the United States Constitution." (JA 12) (She did not, however, give the appropriate notice of the challenge to the constitutionality of the statute to the Attorney General of the Commonwealth of Pennsylvania as required by Pennsylvania Rule of Civil Procedure 235.) (JA 75) She also claimed that she had not filed a complaint earlier because of her fear of Jeter. (JA 12) This claim, incidentally, was rejected by the trial judge who found that "any fear she may have had of Jeter, even if sufficient to toll the statute, lasted only a few years after [a pre-natal] incident" nine years before her complaint was filed. Clark conceded that her complaint was filed more than six years after the birth of her child and more than two years after the last reported "support" contribution. (Opinion of the Trial Judge, JA 70-71)

The trial judge concluded that the applicable statute of limitations did not violate the constitutional rights of Clark or her child. He properly followed the exposition of the Supreme Court of Pennsylvania in *Astemborski v. Susmarski*, 499 Pa. 99, 451 A.2d 1012 (1982). *cert. granted, order vacated and remanded*, 103 S.Ct. 3105 (1983) *order reinstated*, 502 Pa. 409, 466 A.2d 1018 (198[illegible] He dismissed Clark's complaint on July 8, 1985. (JA 72)

Clark appropriately appealed to the Superior Court of Pennsylvania claiming that the ruling by the trial court relying upon the statute of limitations then in effect violated her and her child's rights. While the appeal was pending, the General Assembly of the Commonwealth of Pennsylvania enacted 23 Pa. C.S.A. §4343(b) which provided that "an action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of the birth of the child." (JA 75)

The Superior Court chose to address the issue of the retroactivity of the new eighteen year statute although the issue had not and could not have been raised in the appeal itself. That court concluded that the new statute did not have retroactive application because 1) the Legislature had not "clearly and unambiguously" indicated such an intention; and 2) Clark's cause of action had already been time-barred at least two and one-half years before the effective date (January, 1986) of the new statute. (JA 75-77) The effective date of the new statute is also six months after the final order of the trial court.

Clark preserved her claims in Application for Reargument to the Superior Court and Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. The application and petition were denied. (JA 85-86)

This Honorable Court granted certiorari on January 11, 1988.

SUMMARY OF ARGUMENT

I. On October 30, 1985, the Pennsylvania Legislature enacted a statute of limitations that permitted actions to establish paternity to be brought within eighteen years of the birth of a child born out of wedlock. Before then, in July, 1985, the trial court had ruled that the paternity claim here was barred by the statute of limitations in effect when the claim was filed. The Pennsylvania Superior Court considered petitioner's claim that the statute be applied retroactively. It rejected the claim on sound grounds of statutory construction.

Petitioner asks this Court to apply the Pennsylvania statute retroactively because of the federal Child Support Enforcement Amendment of 1984 and the doctrine of federal supremacy. The Pennsylvania statute is valid; it is not in conflict with the federal statute. The supremacy clause is not implicated here. What is involved here, as in other "power of the purse" cases, is the right of the state to receive federal funds.

II. The Pennsylvania six year statute of limitations in effect when this case was filed is not infirm on equal protection grounds. Pennsylvania, unlike some states, did not separate paternity actions from all other actions

brought to vindicate rights of minors. The six year period was not so short that it prevented one from having a bona fide opportunity to bring a claim. Sound practical considerations and state interests underlay this statute. It did not deny to Clark the equal protection of the law.

III. Petitioner claims that the Pennsylvania six year statute of limitations also offends the due process clause. To sustain this claim she must be able to show, in addition to the existence of a cause of action, that the Pennsylvania statute is arbitrary or irrational. This statute, like all statutes of limitations, may terminate the right to litigate a claim. That fact, alone, does not deprive one of property without due process of law. The Pennsylvania statute passes the test of reasonableness.

ARGUMENT

I. THE LOWER COURT PROPERLY REFUSED TO APPLY RETROACTIVELY PENNSYLVANIA'S EIGHTEEN YEAR STATUTE OF LIMITATIONS TO REVIVE A PATERNITY CLAIM TIME-BARRED BY A FINAL JUDGMENT BEFORE THE EIGHTEEN YEAR STATUTE WAS ENACTED.

The Program for Aid to Families of Dependent Children (AFDC), 42 U.S.C. §601 *et seq.*, is one of four major categorical public assistance programs under the Social Security Act of 1935. The other programs are Old Age Assistance (OAA), 42 U.S.C. §301 *et seq.*, Aid to the Blind (AB). 42 U.S.C. §1201 *et seq.* and Aid For the Permanently and Totally Disabled (APTD). 42 U.S.C. §1351 *et seq.* These programs are the cornerstone of government support and assistance to those in need. Changes in the federal laws and in state actions and reactions to those laws have produced litigation requiring analyses of the impact of the federal laws upon the states and the recipients of federal and state aid.

For sound public policy reasons the Congress passed the legislation involved here, the Child Support Enforcement Amendments of 1984, Pub.L. 98-738, 98 Stat. 1305 (1984). (42 U.S.C. §§651 *et seq.*) These amendments express the power of the Congress: in order for a state to receive federal dollars for the state-administered AFDC programs, a state must adopt at least eighteen procedures.[1] Petitioner focuses on one of these procedures: a state must have "procedures which permit the establishment of the paternity of any child[2] at any time prior to such child's eighteenth birthday." 42 U.S.C. §666(a)(5). She insists that the Congress mandated that any state statute of limitations for paternity claims enacted thereafter be applied retroactively.

After final judgment in this case and while Clark's appeal to the

1 42 U.S.C. §666(a)(2), (a)(3). (a)(4). (a)(5). (a)(6). (a)(7), (a)(8). (a)(9), (b)(l), (b)(2). (b)(3), (b)(4). (b)(5). (b)(6), (b)(7), (b)(8), (b)(9) and (b)(lO).

2 "Any child" and the other provisions of Section 666 apply to legitimate and illegitimate children. In the Family Welfare Reform Act of 1987 (H.R. 1720) the relevant language now is: "every child...who is a member of a family receiving aid under the state plan approved under section 402(a)."

Superior Court of Pennsylvania was pending, the General Assembly of Pennsylvania enacted 23 Pa. Cons. Stat. Ann. 4343(b) which provides: that "an action or proceeding...to establish paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child." [Act of October 30, 1985, P.L. 66, Subchapter C §4343(b), effective January 30, 1986.]

Clark asserts that this statute must be applied retroactively whether an earlier action for support had been held by a court to be time-barred, as here, or no action had been brought although an earlier statute of limitations were available. She relies upon cases like *King v. Smith,* 392 U.S. 309 (1968) to support her argument. In that case and in others to which we shall refer, the state statutes or regulations were attacked as being constitutionally infirm. Clark does not attack the Pennsylvania statute on such grounds; rather, she accepts its validity.

It may be helpful to review some of the occasions on which this Court has tested state statutes and regulations attacked for being in violation of the Social Security Act. In *King v. Smith*, 392 U.S. 309, this Court posed the alternatives for the Alabama legislative and executive branches intent on denying support to any child-legitimate or illegitimate-under the euphemistically entitled "substitute father regulation." The choices for Alabama were to reject federal dollars or to change its regulations. This Court advised Alabama:

> Consequently, if Alabama believes it necessary that it be able to disqualify a child on the basis of a man who is not under such a duty to support, its arguments should be addressed to the Congress and not to this Court. *King v. Smith*, 392 U.S. at 332-333.

If this were not clear, Justice Douglas used different words of advice and warning in his concurring opinion:

> "Under the Court's opinion, however, Alabama is free to revive enforcement of its substitute parent regulations at any time it chooses to reject federal funds made available under the Social Security Act."*King v. Smith*, 392 U.S. at 335, n. 3.[3]

A few years later, this Court again rejected state legislative and executive action in conflict with the Social Security Act. *Townsend v. Swank*, 404 U.S. 282 (1971). The Congress provided that children under the age of 21"regularly attending a school, college, or university, or regularly attending a course of vocational or technical training" were "dependents."

Illnois had a definition of its own: college students between the ages of 18 and 20 were not "dependents." This Court held that the Illinois regulation was inconsistent with the requirement "that aid be furnished 'to all eligible individuals.'" *Townsend v. Swank*, 392 U.S. at 287.

Chief Justice Burger concurred only to explicate, as had Justice Douglas in *King v. Smith*, 392 U.S. at 335, the choices available to the several states under Title IV of the Social Security Act:

> [I]t seems appropriate to keep clearly in mind that Title IV of the Social Security Act governs the dispensation of federal funds and that it does no more than that. True, Congress has used the"power of the purse" to force the States to adhere to its wishes to a certain extent; but adherence to the provisions of Title IV is in no way mandatory upon the States under the Supremacy Clause. The appropriate inquiry in any case should be simply whether the State has indeed adhered to the provisions and is accordingly entitled to utilize federal funds in support of its program.*Townsend v. Swank*, 404 U.S. at 293.

Aid recipients disqualified in Alabama and Illinois attacked the constitutionality of the states' actions as violative of the Supremacy Clause and the Equal Protection Clause. This Court, however, held only that the states had breached the federally imposed obligations under the Social Security Act. The act, including 42 U.S.C. §666, does no more than give state legislatures and agencies the choice

[3] Justice Douglas also stated he would have preferred to reach the constitutional issues raised rather than on the grounds of statutory construction used by the Court.

between federal dollars and federal penalties.[4]

Clark also suggests that although the language of the Act may not mandate retroactive application, a regulation of the Department of Health and Human Services does. The language of the regulation [45 CFR 302.70(a)(5). effective October 1, 1985] is slightly different from the language of the statute. The Secretary writes of procedures for establishing paternity "at least until the child's eighteenth birthday." This language is different from the language of the statute ("prior to...eighteenth birthday"); moreover its simple meaning is in conflict with and is an impermissible expansion of the Congressional meaning: "at least until" is a period of time possibly beyond the eighteenth birthday.[5]

If the Pennsylvania statute is not in conflict with the Congressional act, the next question is whether Pennsylvania courts correctly ruled on the issue of retroactivity. The Pennsylvania Superior Court made clear that the language of the eighteen year statute did not clearly and unambiguously indicate a legislative purpose to have the statute applied retroactively.[6] This Court should find no jurisprudential error there. More compelling in the lower court's holding is its statement that Jeter had raised the shield of the six year statute of limitations, as he was entitled to do, and that there had been a final judgment that Clark's claim was time-barred before the eighteen year statute was enacted.

4 The Social Security Act is, of course, not the only law creating such choices. See, e.g. the action of the Civil Service Commission under the Hatch Act discussed by this Court in State of *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947). The penalty for Oklahoma was the loss of highway funding in an amount equal to two years' salary of an Oklahoma highway official.

5 Legislation proposed in the 100th Congress, the Family WelfareReform Act of 1987 (H.R. 1720), uses the words "prior to" in Section 503(a)(B)(i) in referring to procedures to establish the paternity"...as soon as possible after such child's birth but in any event prior to such child's eighteenth birthday."

6 The Pennsylvania Statutory Construction Act of 1972, 1 Pa. Cons. Stat. Ann. §1926 provides: "No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly."

If this Court were to conclude that Pennsylvania did not follow the procedures under the Act, it may suggest as it did in *Rosado v. Wyman*, 397 U.S. 397 (1970): that the Secretary "afford [Pennsylvania] an opportunity to revise its program in accordance [with the procedures] if the State wishes to do so."

II. THE PENNSYLVANIA SIX YEAR STATUTE OF LIMITATIONS FOR PATERNITY CLAIMS PROVIDED ILLEGITIMATE CHILDREN A BONA FIDE OPPORTUNITY TO OBTAIN PARENTAL SUPPORT.

Clark argues that the six year statute of limitations in effect at the time she filed her charge of paternity against Jeter violates the equal protection clause of the XIVth Amendment. She suggests that any statutory scheme differentiating between legitimate and illegitimate children is constitutionally infirm, either under the XIVth Amendment or under the Vth Amendment *vis `a vis* the Congress.

For the last twenty years, this Court has given regular and consistent attention to the status of illegitimate children. *Levy v. Louisiana*, 391 U.S. 68 (1968) to *Reed v. Campbell*, 476 U.S. 852 (1986). In no case has this Court stated that "the procedures for illegitimate children [must be] coterminous with those accorded legitimate children." *Mills v. Habluetzel*, 456 U.S. 91, 97. In fact, this Court has held otherwise:

> If *Gomez* and the equal protection principles which underlie it are to have any meaning, it is clear that the support opportunity provided by the State to illegitimate children must be more than illusory. The period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock.
>
> The fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt procedures for illegitimate children that are coterminous with those accorded

legitimate children. *Id.* at 97.

Clark now insists that this Court should adopt as its holding here the concurring opinion of Justice O'Connor in *Mills v. Habluetzel*, 456 U.S. at 102. Justice O'Connor wrote lest the opinion "be misinterpreted as approving the 4-year statute of limitation" approved by Texas pending the appeals in *Mills*. In essence, the reasons underlying that concurring opinion and Clark's position are 1) that a state should not separate paternity cases from all other claims of minors;[7] and 2) that the interest of a state in preventing the prosecution of stale or fraudulent claims is "undercut" by countervailing policy considerations and "substantially alleviated" by human leukocyte antigen (HLA) blood tests.

We shall demonstrate that Pennsylvania did not separate paternity cases from all other claims of minors. The statute under attack here was enacted April 28, 1978. Its effective date, June 27, 1978, is the same effective date for a package of statutes of limitations enacted by the Pennsylvania Legislature. These statutes of limitations for actions by minors were not tolled during minority. 42 Pa. Cons. Stat. Ann. §5533.[8] For example, a baby, who suffered permanent brain damage in an automobile accident, could not institute a lawsuit for life-long damages more than two years after the accident. A later statute, effective in June, 1984, repealed 42 Pa. Cons. Stat. Ann. §5533. The new section 5533 provides that "the period of minority shall not be deemed a portion of the time period within which the action may be commenced." The new statute, we note, was not applied retroactively. *Maycock v. Gravely Corporation*, 352 Pa. Super. 421, 508 A.2d 330 (1986).

In Pennsylvania, therefore, paternity claims were not "one of the few...causes of action not tolled during the minority of the plaintiff." *Mills v. Habluetzel*, 456 U.S. at 104 (O'Connor concurring). In fact,

[7] Justice Powell joined Part I of the concurring opinion emphasizing that "it is significant 'that a paternity suit is one of the few Texas causes of action not tolled during the minority of the plaintiff.'" Ibid. at 106.

[8] Seven different periods of limitations were subject to the non-tolling provision. They were periods of six months to fifteen years: 42 Pa. Cons. Stat. Ann. §§ 5522-5528.

when this paternity action was filed in September, 1983, Pennsylvania had no provision for tolling of statutes of limitations during minority except in limited circumstances. At the legally relevant time, Pennsylvania did not separate paternity cases from all other claims of minors.

Clark, probably recognizing that Pennsylvania is unlike Texas which provided for tolling of almost all statutes of limitations during minority, looks to other Pennsylvania statutes including the intestacy laws of Pennsylvania. She points to 20 Pa. Cons. Stat. Ann. §2107(c) which provides: "[f]or purposes of descent by, from and through a person, born out of wedlock, he shall be considered the child of his father." She overlooks two facts: 1) the relevant event is death for which no legislature has been able to create a calendar and which may occur long after minority; and 2) the claim of the child is "subject to such time limitations and to such procedures as are applied to any other heir or claimant...." 20 Pa. Cons. Stat. Ann. §3538. (Claims must be filed "within one year after the first complete advertisement of the grant of letters...or thereafter but prior to...distribution." 20 Pa. Cons. Stat. Ann. §3532.)

Clark also mentions that a putative father in a custody action may seek, at any time, a determination that he is the father of a child. She neglects to point out, however, that a putative father's parental rights may be terminated under 23 Pa. Cons. Stat. Ann. §2511 provided he receives at least ten days notice of the hearing under the involuntary termination statute.

All of the foregoing is written to make clear that at the time this case began Pennsylvania had a hodge-podge of statutes affecting the rights of minors further emphasizing the differences between Pennsylvania and Texas.

The thrust of Clark's attack upon the Pennsylvania statute is that neither Pennsylvania nor any government may make distinctions between legitimate and illegitimate children in matters of support. Such ignores the laws governing support for legitimate and illegitimate children of "an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual." 42 U.S.C. §402(d)(l). The Social Security Act differentiates between legitimate and illegitimate children entitled to support by

its definition of "dependency." A child who "is neither the legitimate nor adopted child" must have been living with or supported by the individual covered under the Act. 42 U.S.C. §402(d)(3).

This classification withstood attack on equal protection grounds under the due process provisions of the Vth Amendment in *Matthews v. Lucas*, 427 U.S. 495 (1976). Since that decision, the Congress revisited Section 402 in 1977, 1980, 1981, 1983, 1984 and 1986. In none of the amendments did Congress change its distinction between legitimate and illegitimate children for the purposes of support.[9]

Disparate treatment for illegitimate children by the Congress may also be found in the Civil Service Retirement Act, 5 U.S.C. §§8301-8348 (specifically, by the definition in §8341); the Federal Employees Health Insurance Act, 5 U.S.C. §§8901-8913 (specifically, by the definition in §8901); and the Federal Survivor Benefit Plan (for the military), 10 U.S.C. §§1447-1455 (specifically, by the definition in §1447).

To date, therefore, neither the Congress nor the courts have required that illegitimate children be accorded all of the benefits and procedures accorded legitimate children.

In the face of an attack upon such a position on equal protection grounds the interest of a government expressed in statutes limiting claims by the passage of time or by the nature of proof required is similar. In both instances, governments raise barriers against claims which may be stale, fraudulent or false. This interest of governments is recognized as valid by Clark. She argues, however, that this interest must be balanced against the countervailing interest of governments in reducing its payments to children who are welfare recipients. It is for the Pennsylvania Legislature and not Clark to use the scales.

When the General Assembly of Pennsylvania enacted the six year statute of limitations it did not do so because of an inordinate desire

[9] Admittedly, most of the amendments did not affect subsection (d), but the 1981 amendments made changes in subsection (d), including (d)(I) by Pub.L. 97-35 §§2203(d)(I), 2210(a)(I), (5)(A).

to protect putative fathers from claims of support. Nor did it act without the knowledge that the support provided for in the statute might replace support from Pennsylvania coffers. The Legislature specifically permitted a complaint to be filed by "any public body or public or private agency having any interest in the care, maintenance or assistance of any person to whom the duty of support is owing." 42 Pa. Cons. Stat. Ann. §6704(b). In addition, payments under an order for support may be transmitted "directly to a public body or public or private agency" which is providing care, maintenance and assistance. 42 Pa. Cons. Stat. Ann §6706(b). In statutes made effective simultaneously with the statutes just mentioned, the Legislature reenacted the "Revised Uniform Reciprocal Enforcement of Support Act (1968)" providing for, *inter alia*, the initiation of proceedings for reimbursement by a state or political sub-division which had furnished support (42 Pa. Cons. Stat. Ann. §6748) and action by the Department of Welfare in pursuing support actions and filing appeals from orders it deemed not to be in the public interest. (42 Pa. Cons. Stat. Ann. §§6757(c) and 6774.)

Clark minimizes the state interest in avoiding stale and fraudulent claims. In so doing, she does not refer to the facts of this case to give meaning to the terms "stale and fraudulent." The broad brush of constitutional argument misses some of the practical considerations present here-and, we suggest, in many of the old cases, stale or not so stale. The reasons for the shield of statutes of limitations are that memories may be faded, witnesses may no longer be available...that defenses that could be raised have disappeared with time. *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945). In a paternity case, several defenses may be raised: non-access to the mother, infertility, evidence of intercourse with others, evidence of accusations against another. Eleven years after conception, the difficulties in proving non-access or access of others are obvious. Just as difficult would be trying to determine if the father named on the birth certificate existed in 1973. What, we ask, would happen to Jeter's defense if it were determined that he is infertile *now* and he asserted such? With all the panoply of protections Clark suggests are available to an accused in a paternity case in Pennsylvania, the single, most nearly impenetrable defense is somewhat smashed because of the passage of time.

We suggest also that in this case there may be the stench of false statements. Clark now says that Green is a fictitious name. At least twice she used it, according to her affidavit and her testimony - at birth and shortly after that when she applied for public assistance. (JA 14 and JA 29-30). She did not mention in her affidavit or her testimony that on October 2, 1975 she also named Green as the putative father. (JA 68, Exhibit 5) This Court recognized that the "obstacles" to filing paternity suits soon after the birth of a child are many. Justice Rehnquist (now Chief Justice) listed several in *Mills v. Habluenzel*, 456 U.S. at 109: "financial difficulties," "continuing affection for the child's father, a desire to avoid disapproval..., or the emotional strain and confusion." Justice O'Connor suggested others in *Mills* at 105: unwillingness to jeopardize a continuing relationship with the father, the possibility of the mother's being a minor herself. Clark's dissembling as late as 1975 when she was twenty-six should remove her from this ambit of concern and protection.

In *Pickett v. Brown*, 462 U.S. 1, 15-16, this Court reiterated its rejection in *Mills* of "the argument that recent advances in blood testing negated the State's interest in avoiding the prosecution of stale or fraudulent claims." The tests referred to in *Mills* and *Pickett* (ABO and HLA) are the tests available for review by this Court in this case. The writer Terasaki is an articulate proponent for the efficacy of the HLA tests as proof of non-paternity and paternity. 16 J. Fam. L. 543 (1977-78) We note he is not without his critics. [See, Jaffee, 17 J. Fam. L. 458 (1978-79)] Terasaki himself does not claim that HLA testing can even in one case, with absolute reliability, narrow the field to less than two possible fathers. 16 J. Fam. L. at 548-49, 551-55.[10] New tests referred to by Clark and amici have not been admitted in evidence in any state of the United States and should not affect "the relationship between a statute of limitations and the State's interest in preventing the prosecution of state or fraudulent paternity claims."

The choice for this Court appears to be between finding the Pennsylvania statute one that provides a bona fide opportunity to obtain

[10] The charts in Terasaki's study do not include any of the Negro samples (17% of his 1000 cases). He writes that the data may reveal some comparatively insignificant variations for race. The record shows that Jeter is black. (JA 5) There is nothing in the record about the race of Cherlyn or Tiffany Clark.

parental support or holding that is it unlikely that any statute differentiating between legitimate and illegitimate children will pass constitutional muster. For the philosophical and practical considerations we advanced, we believe this Court should conclude that the Pennsylvania statute did give the parent and the child the opportunity required by law.

III. THE PENNSYLVANIA SIX YEAR STATUTE OF LIMITATIONS FOR INSTITUTING CAUSES OF ACTION TO ESTABLISH PATERNITY WAS NEITHER ARBITRARY NOR IRRATIONAL AND, THEREFORE, DID NOT CONSTITUTE A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

In none of the cases in which the Court has examined the status of illegitimate children has the Court resolved the issue before it under the provisions of the Due Process Clause of the XIVth Amendment. Of course, it is fair to note that determinations of constitutional infirmities under the equal protection clause obviated the need for discussion of and decision on the due process question. In some cases, this may be because of the "cryptic and abstract words of the Due Process Clause." *Mullane v. Central Hoover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). Justice Jackson continued:

> "[T]here can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case*." Id.(Emphasis added)

Clark and *amici* contend that the Pennsylvania six year statute of limitations deprives children of a property right without due process of law. A cause of action is a property right. In most instances such an entitlement is created by state law; certainly, that is true here.

In its analyses of cases in which deprivation of such property rights is an issue, the Court developed principles to determine what is "appropriate to the nature of the case." In two cases at the same term, *Ferri v. Ackerman*, 444 U.S. 193 (1979). and *Martinez v. State of California*, 444 U.S. 277 (1980), the Court announced principles pertinent here. In *Ferri*, it made clear that it was state law and not

federal law that created a cause of action for malpractice and that it was state law and not federal law that defined the defenses:

> "...When state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *Ibid.* at 198.

Similarly, the Court considered the interest of California in immunizing state officials "paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. State of California*, 444 U.S. at 282. This Court did not find that state statute "wholly arbitrary or irrational." The Pennsylvania statute under attack here cannot be considered "wholly arbitrary or irrational." It provided a reasonable opportunity for a cause of action to establish paternity to be instituted.

In *Logan v. Zimmerman Brush Company,* 455 U.S. 422 (1982), the Court again considered what process is due. In its explication of the powers of a state which do not deprive one of property without due process, it stated:

> The State may erect reasonable procedural requirements for triggering the right to an adjudication be they statutes of limitations, (citations omitted) or, in an appropriate case, filing fees. (citation omitted) And the state certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. *Ibid*, 437. (Emphasis in the original)

The test to be used in considering the Pennsylvania statute of limitations, therefore, is the test of reasonableness. Clark, however, avoids that test. She argues the Pennsylvania statute should not provide that the cause of action be brought by the custodial parent because the failure of the custodial parent to institute such cause of action precludes the child from pursuing such a claim thereafter. Statutes and rules governing the filing of causes of action by minors or infants uniformly provide that a cause of action shall be brought by a next friend or by a guardian *ad litem*.[11] Unless there is a tolling provision in those jurisdictions, the failure to file the cause of action within the applicable period of limitations deprives the infant forever of the right to institute an action. Again, we note that when this cause of action was filed, Pennsylvania did not provide for tolling during the minority of a child with a cause of action. 42 Pa. Cons. Stat. Ann. §5533.

[11] Pa. Rule of Civil Procedure 2028 uses the term guardian which, by definition in Rule 2026 includes "next friend" and "guardian *ad litem*." Fed. R. Civ. P. 17(c) uses "next friend or guardian *ad litem*." Many states, incidentally, permit one over 14 to seek the appointment of a guardian *ad litem*.

Clark concedes (Petitioner's Brief. 36) that the Pennsylvania statute of limitations is clothed with validity. Indeed, she must do so. "Statutes of limitations...'are found and approved in all systems of enlightened jurisprudence.' (citation omitted)...'The right to be free from claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979). She has not shown that the time allowed for instituting an action to determine paternity deprived her or her child of a meaningful opportunity to litigate the issue. Nor has she shown that requiring the action to be brought by a custodial parent is unreasonable or, indeed, different from the procedures for the vindication of the rights of infants everywhere. The statute, we submit, withstands this constitutional attack.

CONCLUSION

For the reasons discussed, the Pennsylvania six year statute of limitations does not violate equal protection or due process clauses. The new Pennsylvania statute should not be applied retroactively to revive a claim already time-barred by final judgment. The judgments of the Pennsylvania courts should be affirmed.

Respectfully submitted,

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No. 87-5565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHERLYN CLARK,

Petitioner,

—v.—

GENE JETER,

Respondent.

ON WRIT OF *CERTIORARI* TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether foreclosing a non-marital child's continuing right to paternal support after six years violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether a six-year statute of limitations for actions brought exclusively by the mother or guardian to establish paternity of a non-marital child for purposes of support violates the Equal Protection Clause to the Fourteenth Amendment of the United States Constitution.

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INTEREST OF AMICI[1/]

The American Civil Liberties Union Foundation (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to preserving and defending the civil liberties and civil rights guaranteed by law. The ACLU of Pennsylvania is one of its state affiliates.

The ACLU has participated in many of the leading decisions in which this Court has defined and protected the constitutional rights of children. This case directly involves the rights of non-marital children to the guarantees of due process and equal protection that are embodied in

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1/ The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Supreme Court Rule 36.2.

the Fourteenth Amendment to the United States Constitution. The values at stake in this case therefore lie at the core of the ACLU's institutional interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case challenges the constitutionality of a Pennsylvania statute that limits to six years the period in which a mother or guardian may establish paternity of a non-marital child for purposes of support from the biological father. The statute affords the child no separate or independent opportunity to establish paternity; if the mother allows the period to lapse, the child forfeits all paternal support during the remainder of his or her minority. In contrast, marital children may pursue claims of support at any time.

This Court has long recognized that non-marital children -- no less than marital -- are entitled to constitutional protection. "Why should the illegitimate child," this Court asked twenty years ago, "be denied correlative rights which other citizens enjoy?" Levy v. Louisiana, 391 U.S. 68, 71 (1968). The Court has thus condemned disabilities and burdens imposed on non-marital children, characterizing them as

> contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility or wrongdoing. Obviously no child is responsible for his birth and penalizing the illegitimate child is an ineffectual -- as well as an unjust -- way of deterring the parent.

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1971). Based on this principle, the Court has invalidated, on equal protection grounds, state laws that limit

to one and two years the period in which a non-marital child may establish paternity and obtain support from the biological father. Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91 (1982).

The Pennsylvania statute at issue in this case caused petitioner's child to lose continuing rights to support from her biological father. Because the statute lacks rational basis and promotes no valid state purpose, it cannot pass constitutional muster.

The statute violates procedural due process in three respects. First, the statute impermissibly allows a third-party to waive the non-marital child's right to support. The right to support, of course, belongs to the child, not the mother or guardian. It is a right which,

under Pennsylvania law, continues throughout the child's minority. This Court has recognized that the non-marital child's interest in paternal support may be at odds with other interests of the mother. Due process requires, therefore, that the child have an independent right to seek support that the mother might otherwise abandon. Because the Pennsylvania statute allows a paternity action to be brought only by the mother or guardian, it creates the very "insurmountable barrier" that this Court has condemned in related contexts. See Trimble v. Gordon, 430 U.S. 762, 770 (1977).

In equal measure, the statute impermissibly deprives the non-marital child of a forum in which to enforce his or her continuing right to support from the biological father. Because the right to support

continues during the period of minority, the loss to the child is significant and grievous.

The statute also violates procedural due process by extinguishing the non-marital child's continuing right to support before that right even accrues. As we have seen, the right to support continues throughout the period of minority. In many instances, therefore, the right to support will not -- and cannot -- accrue until after the limitations period has lapsed.

The statute also violates substantive due process because it creates an arbitrary bar that unfairly punishes an innocent child for the actions of his or her parents. Given the state's compelling interest in the welfare of children and the absence of any valid countervailing

interest, no rational basis exists for limiting a non-marital child's right to seek support. Any purported interest in preventing stale or fraudulent claims is undermined by the fact that the state imposes no comparable limitation on paternity actions in other contexts. Thus, for example, the Commonwealth imposes no limitation on the period in which paternity may be established in order to inherit from the biological father. Indeed, the statute itself permits a support action to be brought at any time during the period of minority if the putative father has contributed voluntarily to the child's support within two years of the filing of the suit. In any event, administrative convenience cannot justify penalizing a child for actions that he or she cannot control, given the important societal interest in

protecting children, reducing welfare rolls and ensuring justice.

Finally, the statute violates equal protection because it imposes a severe limit on the period in which actions for support may be brought on behalf of non-marital children, but no such limit on marital children. Nor does the period of limitations substantially relate to any valid state interest. While proof of paternity has been a traditional concern, the accuracy of current blood testing procedures forecloses any legitimate state interest in the avoidance of fraud or abuse.

Thus, Pennsylvania's six-year statute of limitations to determine paternity of non-marital children for purposes of support is constitutionally deficient under both the Due Process and the Equal

Protection Clauses of the Fourteenth Amendment.

ARGUMENT

I. Pennsylvania's Six-Year Statute Of Limitations Violates A Non-Marital Child's Right To Procedural Due Process

A. Introduction

During the past few decades, this Court, as well as appellate courts nationwide, has recognized the rights of children to constitutional protection.

> A child, merely on account of his minority, is not beyond the protection of the Constitution ... . "[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."

Bellotti v. Baird, 443 U.S. 622, 633 (1979) (citations omitted). It is thus well-settled that "[m]inors ... are protected by the Constitution and possess constitutional rights." Planned Parenthood of Central

Missouri v. Danforth, 428 U.S. 52, 74 (1976).

At the same time, this Court has elaborated the rights of family members and the respective duties and obligations between parent and child. Essential to this development is the view that children are not merely the property of their parents but rather have claims and rights that may be asserted independent of or against the mother or father. See, e.g., Gomez v. Perez, 409 U.S. 535 (1973).

That the state may not deprive a child of property without affording due process of law is thus beyond dispute. Goss v. Lopez, 419 U.S. 565, 578-79 (1975); see also In re Gault, 387 U.S. 1, 27-28 (1967) (right to due process in juvenile delinquency proceedings); accord DeSantis v. Yaw, 290 Pa. Super. 535, 434 A.2d 1273

(1981); Kaur v. Singh Chawla, 11 Wash. App. 362, 522 P.2d 1198 (1974).

Non-marital children, no less than marital, are entitled to the guarantees of due process and equal protection. Indeed, the historical stigma attached to non-marital children has led this Court to show "special concern" on their behalf, and to subject disabilities visited on children born out-of-wedlock to heightened scrutiny. Pickett v. Brown, 462 U.S. 1, 7 (1983); see also Trimble v. Gordon, 430 U.S. at 762; Gomez v. Perez, supra, 409 U.S. at 535.

In this case, the Commonwealth of Pennsylvania completely and permanently foreclosed Tiffany Clark, petitioner's non-marital daughter, from asserting her legal right to support from her biological father. As a result of the application of

a six-year statute of limitations for paternity actions, the child had no opportunity to enforce her right to receive support.[2] The statute permits an action of paternity to be brought only "by a person having custody of the minor" or by a "public body or public or private agency having any interest in the care, maintenance or assistance" of the child.[3] 42 Pa. Cons. Stat. Ann. § 6704(b).[4] Here

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2/ The challenged statute, 42 Pa. Cons. Stat. Ann. § 6794(c), has since been repealed and replaced with an 18-year statute of limitations. 23 Pa. Cons. Stat. Ann. § 4343(b).

3/ Proof of paternity is a prerequisite to the successful prosecution of a support action when paternity is contested. Clark v. Jeter, 358 Pa. Super. 550, 518 A.2d 276, 279 (1986).

4/ While the Superior Court in the case below cited § 6704(b) as establishing the procedure for bringing a support action, the substance of § 6704(b) was incorporated in Pennsylvania Rule of Civil Procedure 1910.3 in 1981, at which time § 6704(b) was suspended. The Explanatory Note to Rule 1910.3 provides that the rule simply continues in place the practice which had existed

(continued...)

the child's mother -- due to a combination of factors, including physical abuse by the biological father and misinformation received from the Pennsylvania welfare department -- unwittingly allowed the limitations period to lapse. As a result, without any hearing or any forum in which to assert her claims, the daughter lost all rights to paternal support for the rest of her formative years.

Under the Due Process Clause of the Fourteenth Amendment to the Constitution, states must provide each individual "that process which, in light of the values of a free society, can be characterized as due." Boddie v. Connecticut, 401 U.S. 371, 380 (1971). At a minimum,

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4/ (...continued)
under the statute.

> absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

Id. at 377. This opportunity must be "granted at a meaningful time and in a meaningful manner." Id. at 378 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). Because the challenged statute -- since repealed -- compelled a non-marital child such as Tiffany Clark to settle claims to support without affording any meaningful opportunity to be heard, it cannot survive scrutiny under basic principles of due process.

B. Under Pennsylvania Law, A Non-Marital Child Has A Property Right To Parental Support Throughout The Period Of Minority

Whether Pennsylvania's six-year statute of limitations violates the requirements of due process requires a

two-part analysis. First, petitioner must show that the government action affected a cognizable property or liberty interest established by state law. Board of Regents v. Roth, 408 U.S. 564 (1972). "To have a property interest ... a person clearly must have more than a unilateral expectation of it, they must, instead, have a legitimate claim of entitlement to it." Id. at 566.

Under Pennsylvania law, a child -- whether marital or non-marital -- has a right to parental support throughout the period of minority. The Pennsylvania courts have consistently recognized that "it is beyond question that every parent has a duty to support his or her minor children," Costello v. Lenoir, 462 Pa. 36, 337 A.2d 866, 867-868 & n.1 (1975); Conway v. Dana, 456 Pa. 536, 538, 318 A.2d 324, 325 (1974).

A parent's fundamental obligation to support his or her child has been characterized by the Pennsylvania courts as "deeply rooted in our law" and "well nigh absolute" in our society. Commonwealth, Dep't of Public Welfare ex rel. Hager v. Woolf, 276 Pa. Super. 433, 437, 419 A.2d 535, 537 (1980)(quoting Commonwealth ex rel. Kaplan v. Kaplan, 236 Pa. Super. 26, 344 A.2d 578 (1975)); Commonwealth ex rel. Snively v. Snively, 206 Pa. Super. 278, 212 A. 2d 905 (1965).[5/] A non-marital child has a right to support from his or her parents that is equivalent to that of a marital child. See, e.g., Commonwealth v. Staub, 461 Pa. 486, 491, 337 A.2d 258, 260 (1975); Commonwealth v. Rebovich, 267 Pa.

5/ Pennsylvania also imposes a statutory obligation on parents to support their children. 62 Pa. Stat. Ann. § 1973.

Super. 254, 258, 406 A.2d 791, 793 (1979).

As this Court has explained:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. at 577. Pennsylvania's civil support statute -- which contains the six-year statute of limitations at issue in this case -- provides a procedure for enforcing the child's substantive right to parental support, Jennis v. Stillman, 306 Pa. Super. 431, 452 A.2d 801, 802 (1982), which is a property right under Pennsylvania law. See, e.g., DeSantis v. Yaw, 290 Pa. Super. at 540, 434 A.2d at 1275-76.

A non-marital child such as Tiffany Clark thus has an identifiable and "legitimate claim of entitlement," Board of Regents v. Roth, 408 U.S. at 577, to support from her biological father, a right which continues throughout the period of minority and, in certain circumstances, even beyond. See, e.g., Commonwealth ex rel. Leider v. Leider, 335 Pa. Super. 249, 484 A.2d 117 (1984). This property interest is significant and has enormous impact on a child's quality of life during the formative years. The Commonwealth of Pennsylvania may not eliminate or limit this important property interest without affording the non-marital child due process of law.

C. The Six-year Statute Of Limitations Impermissibly Forecloses A Non-Marital Child's Right To Support Without Providing A Meaningful Opportunity To Be Heard

"Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). As we have seen, Pennsylvania failed to provide petitioner's infant with any independent opportunity to enforce her continuing right to support. Instead, the child was made to depend on the legal actions of her custodial representative during a truncated six-year period. The operation of the statute allowed a third-party to waive irrevocably the non-marital child's right to support.

In Mathews v. Eldridge, 424 U.S. 319 (1976), the Court identified three factors to be considered in determining "what process is due":

> First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. These factors will be addressed seriatim.

1. The Statute Deprived The Non-Marital Child Of An Important Property Right To Support

In this case, the private interest most grievously affected is the non-marital child's right to receive support from her biological father. The child's interest is significant and its loss may be determinative of the basic quality not only of her formative years, but of her future as well. Without paternal support, the child

may be reduced to economic marginality, become dependent on public assistance, and be foreclosed from a broad range of educational and cultural opportunities.

2. The Statute Creates A Significant Risk Of Erroneous Deprivation

Notwithstanding the importance of the child's interest, the statute creates a substantial risk of erroneous deprivation of this significant entitlement. The inadequacy of its procedures goes far beyond the mere "risk" of "erroneous" deprivation; it guarantees an absolute deprivation of ongoing support unless the mother or other custodian takes action on the child's behalf during a limited six-year period.

a. The Statute Allows A Third Party To Waive Irrevocably The Non-Marital Child's Rights To Support

By denying the non-marital child an independent cause of action, the statute allows a third-party to waive irrevocably

significant property rights to support from the father. The restrictions imposed on the custodial representative heighten the risk of erroneous deprivation.

The six-year period allowed under the statute could not reasonably have been expected to afford the mother sufficient time to assert the child's rights on its behalf. The physical, financial and economic complications attendant upon a non-marital birth are known to continue and perhaps even increase in magnitude during the child's early years. This Court has explained that "practical obstacles to filing suit within one year of birth could as easily exist several years after the birth of an illegitimate child." Pickett v. Brown, 462 U.S. at 11. These obstacles become more -- not less -- formidable with each passing year: "The mother may

experience financial difficulties caused not only by the child's birth but also by the loss of income attributable to the need to care for the child." Id. at 12.

Nor do the emotional complications of a non-marital birth necessarily subside during a brief six-year period. The mother may believe that formal steps to adjudicate paternity will precipitate retribution by the father or cause voluntary support or visitation to cease. In the case here, the mother suffered abuse at the hands of the biological father. When she finally did elect to adjudicate paternity, she received inaccurate information from the Pennsylvania welfare department. Unsophisticated and misinformed, she discovered too

late that the limitations period had lapsed.6/

Thus, a range of factors may disable a mother or guardian from bringing an action to adjudicate paternity in the first six years of the child's birth. Ignorance of the statutory period, fear of the child's father, lack of financial need during the relevant time period, or a continuing emotional tie to the father may cause inaction and result in an irrevocable waiver of the child's right to support.

Moreover, the interests of the mother during this period may not in fact be "congruent" with those of the child. See generally Mills v. Habluetzel, 456 U.S. at

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6/ The statute also provides that a support action may be brought within two years of any contribution by the father to the child's support or of any written acknowledgement of paternity. The two-year period, however, is likewise not realistic given the practical obstacles that the mother must face.

105 & n.4 (O'Connor, J., concurring). A mother may refrain from initiating legal proceedings in order to encourage a continuing emotional relationship with the father or to avoid community or family disapproval. Ibid. In addition, the mother may be able to support the child initially. After the expiration of the statute of limitations, however, she may lose her job, exhaust savings, or become disabled, at which time the child's need for support from the biological father could become critical. See also Spada v. Pauley, 149 Mich. App. 196, 385 N.W.2d 746 (1986) (mother's interests may not sufficiently coincide with those of child to protect the child's rights).

By failing to provide the child any independent right of action separate from

the mother, the statute creates a significant risk of erroneous deprivation.

b. The Statute Failed To Provide The Non-Marital Child With A Forum To Enforce His Or Her Continuing Right To Support

This risk is compounded by the fact that Pennsylvania provides no forum in which the non-marital child can enforce his or her ongoing right to support. As we have seen, under Pennsylvania law, a parent's obligation to support a child and the child's concomitant right to receive support is continuous throughout the period of the child's minority and, under some circumstances, even beyond. See Commonwealth ex rel. Leider v. Leider, 335 Pa. Super. at 249, 484 A.2d at 117; Jennis v. Stillman, 306 Pa. Super. at 431, 452 A.2d at 801 (1982); see also State of Florida, Department of Health and

Rehabilitative Services ex rel. Gillespie v. West, 378 S.2d 1220, 1227 (Fla. 1979) (child's right to support is "a continuing right renewing itself until the child becomes eighteen," which "has never become dormant"). The due process to which non-marital children are entitled must include some opportunity in some forum to enforce this continuing right to support.

c. The Statute Extinguished The Non-Marital Child's Rights To Support Before Those Rights Accrued

The statute further heightens the risk of erroneous deprivation by extinguishing the non-marital child's right to support before that right has even accrued. The typical statute of limitations bars the assertion of a claim after the lapse of a period of time defined subsequent to the accrual of a right. As we have seen, the parent's obligation to provide and the child's right to receive support continues

throughout the period of minority. See also State of Florida ex rel. Gillespie v. West, 378 So.2d 1220, 1227 (Fla. 1979)(child's right to support is "a continuing right renewing itself until the child becomes eighteen," which can "never become dormant"). Pennsylvania's six-year statute, however, bars the assertion of the child's right to support after the age of six prior to accrual of that right -- thus completely foreclosing the child's "opportunity to be heard."

No statute of limitations can begin to run, of course, until a cause of action accrues. Sicola v. First National Bank of Altoona, 404 Pa. 18, 170 A.2d 584 (1961). Under settled Pennsylvania law, a cause of action accrues when the injury is actually suffered, not when the cause which ultimately produces the injury is first set in

motion. Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949).7/

Far from preventing the institution of "stale" claims, therefore, the six-year statute destroys a non-marital child's right to seek support before those claims can even accrue. Cf. County of Lenoir ex rel. Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816 (1980)(since child has right to support throughout its minority, claims for support can never be stale).8/

7/ Moreover, under longstanding principles of Pennsylvania law, a statute of limitations will not bar an action for a continuing wrong. See Kane Gas Light & Heating Co. v. Pennzoil Co., 95 F.R.D. 531, 533-34 (W.D. Pa. 1982). Cf. Stuebig v. Hammel, 446 F.Supp. 31, 35 (M.D. Pa. 1977); Anaconda Company v. Metric Tool & Die Co., 485 F.Supp. 410, 426 (E.D.Pa. 1980).

8/ While the legislature may constitutionally abolish a right of action without substituting another means of redress, see e.g., Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978), that principle is inapplicable under the present circumstances, since the legislature clearly may not abolish the support

(continued...)

d. The Importance Of The Child's Interest And The Risk Of Deprivation Outweigh Any Administrative Burden That The State Might Claim

Additional or substitute procedural safeguards would significantly reduce the risk of an erroneous deprivation of the child's rights. The need for such procedures is also grounded upon the "fundamental fairness" required by the Due Process Clause, see Lassiter v. Department of Social Services, 452 U.S. 18, 24 (1981). The importance of the child's ongoing interest in paternal support and the substantial, predictable risk of erroneous deprivation far outweigh any fiscal or administrative burden that the state might claim. Indeed, Pennsylvania has since

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8/ (...continued)
rights of illegitimate children while maintaining those rights for legitimate children. Gomez v. Perez, 409 U.S. at 535.

amended its paternity law to provide an eighteen-year statute of limitations. 23 Pa. Cons. Stat. Ann. § 4343(b). Thus, the legislature has already indicated that the state will suffer no untoward "fiscal and administrative burdens" by keeping its courts open to adjudicate claims by non-marital children for support. Moreover, the Commonwealth allows paternity actions to be brought by children of any age pursuant to inheritance proceedings, 20 Pa. Cons. Stat. Ann. § 2107(c)(3), and allows the tolling of other causes of action during the child's minority, 42 Pa. Cons. Stat. Ann. § 5533.9/

9/ In DeSantis v. Yaw, 290 Pa. Super. at 535, 434 A.2d at 1273, the Pennsylvania Superior Court, with great reluctance, upheld a statute of limitations barring a minor's tort suit. Since DeSantis was decided, the Pennsylvania tolling statute, 42 Pa. Cons. Stat. Ann. § 5533, has been revised to provide that "if an individual entitled to bring a civil action is an unemancipated minor at the time
(continued...)

Given the Commonwealth's compelling interest in the welfare of children, the doing of justice, and the reduction of state welfare rolls, it can have no legitimate countervailing interest in depriving non-marital children of a forum in which to pursue claims for support to which they are entitled. Absent additional procedural safeguards, however, the constitutional requirement of a "meaningful opportunity to be heard ... at a meaningful time and in a meaningful manner" is reduced to a mere platitude. See Boddie v. Connecticut, 401 U.S. at 377-378.

9/ (...continued)
the cause of action accrues, the period of minority shall not be deemed a portion of the time period within which the action must be commenced." Since under the Pennsylvania support statute, a non-marital child is not "entitled to bring a civil action," tolling does not occur during the period of minority.

Under similar circumstances, state appellate courts have consistently invalidated statutes of limitations for paternity actions where the child does not have a right of action independent from that of the custodial representative. These statutes also worked to deprive the child of a forum in which to enforce ongoing claims to support, and to extinguish claims to support before they can occur.

In Kaur v. Singh Chawla, 11 Wash. App. at 362, 522 P.2d at 1198, for example, the Washington Court of Appeals, considering a two-year statute of limitations, held that a non-marital child's right to support from the biological father could be judicially enforced under common law even if the legislature had not created a statutory cause of action on behalf of the child:

> [T]he duty to support an illegitimate child does not expire at the end of the second year of a child's life simply because his mother has failed to bring and action to establish the identity of his father.

Id. at 336, 522 P.2d at 1200 (quoting State v. Bowen), 80 Wash.2d 808, 811, 498 P.2d 877, 879 (1972)).10/ Emphasizing that "the law does not permit one to forfeit another's rights," the court stated:

> [t]he right of an illegitimate child to assert a claim for parental support is too fundamental to permit its forfeiture by its mother's failure to timely institute a filiation proceeding.

Kaur, 522 P.2d at 1200.

10/ In State v. Bowen, 80 Wash.2d 808, 498 P.2d 877 (1972), the Supreme Court of Washington examined an unmarried mother's agreement to waive future claims for child support in return for a lump-sum payment from the putative father. The Court explained that any attempted waiver of the child's support rights would be deemed ineffective unless the consideration paid was at least equal to that which "the law would require in a filiation proceeding." Id. at 881.

Concluding that Washington's two-year statute of limitations would violate due process if the statutory filiation procedure provided the exclusive remedy to adjudicate paternity, the court construed the law to permit the child to bring an independent common law action. Id. at 1201.

In Huss v. DeMott, 215 Kan. 450, 524 P.2d 743 (1974), the Supreme Court of Kansas likewise considered a state filiation procedure that on its face allowed only the mother to initiate an action for support. As in Pennsylvania, the Kansas statutory framework provides "machinery for the enforcement of a duty already existing rather than ... creating a new obligation." 215 Kan. at 454, 524 P.2d at 746 (quoting Doughty v. Engler, 112 Kan. 583, 211 P. 619 (1923)). Cf. Jennis v.

Stillman, 306 Pa. Super. at 431, 452 A.2d at 801.

In Huss, the mother attempted to compromise or otherwise settle the child's right to support. The court invalidated the agreement on the ground that the legislature, in authorizing the mother to bring a paternity action on behalf of the child, did not intend to relieve the biological father of his obligation to support. Construing the statute to bar only the mother's cause of action after the limitations period had lapsed -- but not the child's common law action -- the court upheld the statute. 524 P.2d at 747.

In contrast, the statute here has been construed as providing an exclusive procedure for the determination of paternity. Clark v. Jeter, 358 Pa. Super. at 560, 518 A.2d at 281. Since the statute permits a

third-party to waive the non-marital child's continuing right to support, it unconstitutionally erects an impenetrable barrier which deprives the child of due process. See Doak v. Milbauer, 216 Neb. 331, 343, N.W. 2d 751 (1984)(statute of limitations held constitutional where construed to preclude only mother's cause of action); Stringer v. Dudoich, 92 N.M. 98, 583 P.2d 462 (1978)(statute held unconstitutional to extent it limited right of non-marital child to seek paternity determination and support); Ortega v. Portales, 134 Colo. 537, 307 P.2d 193 (1957)(unconstitutional to deprive child of right to support by failure of third-party to act within specified period after birth).11/

11/ Additionally, prior to this Court's decision in Mills v. Habluetzel, 456 U.S. 91 (1982), the Texas Court of Civil Appeals held unconstitutional a statute that effectively allowed a mother to (continued...)

Thus, balancing the factors set forth by this Court, Pennsylvania's six-year statute of limitations does not comport with the procedural requirements of due process.12/

II. The Pennsylvania Six-Year Statute Of Limitations Lacks Any Rational Basis And Violates Substantive Due Process

Pennsylvania's six-year statute of limitations also violates substantive due process. As this Court has stated:

11/ (...continued)
waive a non-marital child's right to support. In re Miller, 605 S.W.2d 332 (Tex. Civ. App. 1980), aff'd sub nom. In re J.A.M., 631 S.W.2d 730 (Tex. 1982).

12/ Even if Pennsylvania were to establish a procedure providing a presumptively suitable representative of a child with reasonable notice -- including notice that the failure to establish paternity within the statutory time period would forever bar the child's right to bring an action for support -- an opportunity to be heard, the procedure would still be constitutionally suspect if it continued to permit a third-party to waive the child's rights to seek support or if it foreclosed those rights before they accrued.

> It is the child's interest that are at stake. The father's duty of support is owed to the child, not to the mother ... . Moreover, it is the child who has an interest in establishing a relationship to his father ... . Restrictive periods of limitation, therefore, necessarily affect the interest of the child and their validity must be assessed in that light.

Pickett v. Brown, 462 U.S. at 16 n.15. The Pennsylvania Supreme Court has likewise recognized:

> The primary interest of the State is to secure support for the child born out of wedlock and to prevent it from becoming a public charge.

Commonwealth v. Staub, 461 Pa. at 491, 337 A.2d at 260. See also Conway v. Dana, 456 Pa. at 540, 318 A.2d at 326 (primary purpose of child support is best interest and welfare of the child); Payne v. Prince George's County Department of Social Services, 67 Md. App. 327, 507 A.2d 641, 646 (1986) (right to support is fundamentally the right of the child).

The Pennsylvania statute, however, ignores the child's interest by foreclosing all possibility of paternal support unless a third-party institutes an action to adjudicate the child's paternity before the child reaches the age of six.

This Court has repeatedly rejected classifications that deny benefits to a needy child based on the behavior of the child's parent or some other third-party. In a broad range of contexts, the Court has recognized the impermissibility of visiting the sins of a parent upon a child. E.g., U.S. Constitution Art. III, § 3, ¶2 (prohibiting corruption of blood as punishment for treason); Plyler v. Doe, 457 U.S. at 202 (prohibiting denial of education to child of undocumented alien resident in Texas); Weber v. Aetna Casualty & Surety

Co., 406 U.S. at 164 (prohibiting discrimination against non-marital child).

Non-marital children such as Tiffany Clark can "affect neither their parents' conduct nor their own status." Trimble v. Gordon, 430 U.S. at 770. It is "difficult to conceive of a rational justification for penalizing" non-marital children who require support simply because paternity is not proved during the first six years of their lives. See Plyler v. Doe, 457 U.S. 202, 220 (1982). Vague assertions of fiscal burden cannot justify wholesale exclusion of the child's claim to support. Indeed, as we have seen, the state has since amended its statute to allow an eighteen-year period of limitations. In virtually all other instances, Pennsylvania tolls the statute of limitations throughout the period of minority. 42 Pa. Cons.

Stat. Ann. § 5533(b). In addition, the Commonwealth imposes no limitation on the right to determine paternity in other contexts, even when significant financial and emotional interests are at stake, such as inheritance. Any purported state interest in avoiding stale claims must thus be seen as de minimis.

The support of minor children must be seen as an essential concern for any society that values family rights, personal responsibility and the promotion of independence and self-sufficiency among its citizens. In light of the absence of any valid countervailing interest, there is simply no rational basis for the imposition of Pennsylvania's six-year statute of limitations upon the rights of non-marital children to support.

III. Pennsylvania's Since Repealed Six-Year Statute Of Limitations Violates The Equal Protection Clause Of The Fourteenth Amendment

A. Introduction

This Court has traditionally subjected "statutory classifications based on illegitimacy to a heightened level of scrutiny." Pickett v. Brown, 462 U.S. at 7. "[R]estrictions on support suits by illegitimate children 'will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.'" Id. at 8, quoting Mills v. Habluetzel, 456 U.S. at 99.

To pass this exacting level of scrutiny, the classification must satisfy two related criteria. First, the time period permitted by the state to establish paternity (and hence obtain support) must be sufficiently long to allow claimants a reasonable opportunity to file suit.

Second, the period of limitations must be substantially related to the state's asserted interest in preventing the litigation of stale or fraudulent claims.

Amici discuss below the second of these two equal-protection criteria articulated by this Court: Whether the six-year statute of limitations is substantially related to a valid state interest in preventing stale or fraudulent claims. Specifically, we focus on recent developments in blood testing technology that seriously undermine the state's traditional interest in proof of paternity and the avoidance of spurious claims.

In Pickett and Mills, this Court invalidated statutes of limitations in paternity actions that were found not to relate substantially to any valid state interest in preventing stale or fraudulent

claims. Pickett v. Brown 462 U.S. at 1; Mills v. Habluetzel, 456 U.S. at 91. Both decisions analyzed the traditional problems of proof in paternity actions in light of scientific developments as of 1976 in the field of blood testing. The Court relied on a scientific report, published in 1976, "'that blood tests currently can achieve a 'mean probability of exclusion [of] at least ... 90 percent ... .'" Pickett v. Brown, 462 U.S. at 17, quoting Miale, Jennings, Reggberg, Sell, & Krause, Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Family L.Q. 247 (1976).

In Mills, the Court rejected the argument that recent advances in blood testing completely negated the state's interest in avoiding the prosecution of stale or fraudulent claims. 456 U.S. at 98

& n.4. Pickett, however, acknowledged that

> [i]t is not inconsistent with this view ... to suggest that advances in blood testing render more attenuated the relationship between a statute of limitations and the State's interest in preventing the prosecution of stale or fraudulent paternity claims. This is an appropriate consideration in determining whether a period of limitations governing paternity actions brought on behalf of illegitimate children is substantially related to a legitimate state interest.

462 U.S. at 18-19.

Since Mills and Pickett -- and the 1976 report on which the Court relied -- developments have occurred in the field of blood testing that significantly reduce "'the possibility that a defendant will be falsely accused of being the illegitimate child's father.'" Pickett v. Brown, 462 U.S. at 17, Mills v. Habluetzel, 456 U.S. at 100 (O'Connor, J. concurring).

Scientific developments have also substantially improved, to a high degree of certainty, the capacity for affirmative identification of a non-marital child's biological father. Recent technology has thus so attenuated the state's interest in precluding stale and fraudulent claims that there is no longer any rational basis for eliminating a child's ability to enjoy his or her continuing rights to support.13/

B. Advances In Blood Testing and Its Increased Acceptance Results In Paternity Actions

At the beginning of this century, Karl Landsteiner discovered that people could be classified by three blood groups -- A, B,

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13/ As the Supreme Court of Appeals of West Virginia noted in State of West Virginia ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (1981), "statutes which are entirely rational at the time they are enacted by the legislature may, by the passage of decades, become irrational when applied to an entirely changed social structure." Id. at 915.

and 0. Over the next several decades, scientific research led to the introduction of number of other blood-grouping tests.14/

These blood tests were able to provide "exclusionary" evidence probative of non-paternity; that is, a negative test result eliminated an accused male from the pool of putative fathers. By 1975, traditional blood testing techniques could establish a probability of exclusion of over 90 percent. See generally Shaw, Paternity Determination: 1921 to 1983 and Beyond, 250 J. A.M.A. 2536 (Nov. 11, 1983)(citing Shaw and Kass, Illegitimacy, Child Support, and Paternity Testing, 13 Houston L. Rev. 41 (1975)).

14/ Six grouping tests predominated: the ABO, Rh, MNSs, Kell, Duffy and Kidd systems. Kolko, Admissibility of HLA Tests to Determine Paternity, 9 Fam. L. Rep. (BNA) 4009, 4010 (Feb. 15, 1983).

Over the last two decades, developments in the sophisticated human leukocyte antigen ("HLA") system have significantly increased the possibility of certainty in blood testing for paternity. Terasaki, Resolution by HLA Testing of 1,000 Paternity Cases Not Excluded by ABO Testing, 16 J. Fam. L. 543 (1977-78). "The scientific fact is that blood typing in its various forms now is capable of establishing nonpaternity in the vast majority of cases (95-99%) in which the man named by the mother actually is not the father." Broun and Krause, "Paternity Blood Tests and the Courts," in Inclusion Probabilities and Parentage Testing 171 (R. Walker Ed. 1983).

Initially, courts were reluctant to allow a jury to consider blood test results in disputed paternity cases. Before the

HLA test was developed, blood test results were admissible only to exclude an alleged father from the pool of putative fathers. In 1950, Justice Brennan, then a judge of the New Jersey Superior Court, summarized the legal status of blood typing:

> The value of blood tests as a wholesome aid in the quest for truth in the administration of justice ... cannot be gainsaid in this day. The reliability as an indicator of the truth has been fully established. The substantial weight of medical and legal authority attests their accuracy, not to prove paternity, and not always to disprove it, but "they can disprove it conclusively in a great many cases provided that [the tests] are administered by specially qualified experts."

Cortese v. Cortese, 10 N.J. Super. 152, 156, 76 A.2d 717, 719 (1950)(citations omitted). Two years later, in 1952, the American Medical Association endorsed the use of blood tests by courts in paternity cases. Davidsohn, Levine, and Weiner,

Medicolegal Applications of Blood Grouping Tests, 149 J. A.M.A. 699 (1952).

In a growing number of states, evidence of a properly conducted blood grouping test which excludes paternity is conclusive on the issue. See Broun and Krause, "Paternity Blood Tests and the Courts," at 174; see e.g., Tex. Fam. Code Ann. § 13.05(a) (requiring dismissal with prejudice of a paternity action predicated on blood test results excluding the respondent as the natural father of the child). In addition to exclusionary evidence proving that the respondent is not the natural father, several states now also make admissible blood tests that are understood to show affirmatively the probability or likelihood of paternity. A number of states have specific statutory provisions permitting the introduction of

"probability" evidence in paternity cases. See e.g., Cal. Evid. Code § 892, 895; Colo. Rev. Stat. § 13-25-126; Ga. Code Ann. 19-7-45, 19-7-46; Idaho Code § 7-1115; Iowa Code Ann. § 675.41; Mich. Comp. Laws Ann. § 722.716; Nev. Rev. Stat. § 126.131; N.Y. Fam. Ct. Act §§ 418 and 532; N.C. Gen. Stat. § 49-7; Wis. Stat. Ann. §§ 767.47, 885.23.

North Carolina, for example, was one of the first states to acknowledge that advances in blood testing techniques had dramatically altered traditional concerns about proof of paternity in contested actions. In 1979, the state legislature found:

> [T]he medical state of the art was formerly such that blood tests made in paternity cases could only be used to exclude a putative parent from the class of persons potentially capable of being the biological parent; however, a recent breakthrough in medical science now enables extended factor blood tests to show the inclusionary probability that a putative parent is the biological parent of a child.

Brown and Krause, "Paternity Blood Tests and the Courts," at 177-178 (quoting General Assembly of North Carolina, Session 1979, ch. 576, Senate Bill 230). Upon motion, the North Carolina court may order the parties in "any civil action in which the question of parentage arises" to submit to

> any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged-parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist,

duly qualified geneticist, or other qualified person ... .

Ibid. (emphasis added).

Pennsylvania has adopted the Uniform Act on Blood Tests to Determine Paternity and mandates the use of court-ordered HLA and related blood tests to establish paternity. 42 Pa. Cons. Stat. Ann. § 6136. ("[i]f the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests are that the alleged father is not the father of the child, the question of paternity, parentage or identity of a child shall be resolved accordingly").

Pennsylvania thus permits the introduction of blood test results to exclude a respondent as a possible father, which can serve as conclusive evidence of non-paternity. In addition, inclusionary evidence is also allowed. In Turek v.

Hardy, 312 Pa. Super. 158, 458 A.2d 562 (1983), for example, the Pennsylvania Superior Court held that an HLA test indicating a probability of parentage was admissible as evidence of paternity.

C. Recent Developments Now Enable the Identification of Biological Fathers

Recent scientific developments have refined still further the state's ability to identify the biological father of a non-marital child. The discovery of "DNA sequence polymorphisms" have resulted in tests that make paternity identification nearly certain except where the alleged father has an identical twin. Shaw, Paternity Determination: 1921 to 1983 and Beyond, 250 J. A.M.A. 2536 (1983). These tests rely on the fact that each person has different sequences of DNA, the substance which makes up chromosomes and carries the

genetic code determining personal characteristics such as eye color and hair texture. Given these individual "DNA sequences," it is possible through DNA testing to identify a particular male as a child's biological father to the virtual exclusion of all others. Ibid.

One such test, involving "DNA fingerprinting," was developed in 1985 by geneticist Alec Jeffreys and his colleagues at the University of Leicester in England. The probability that the genetic fingerprints of two individuals will be identical is calculated to be of the order of 3×10^{-11}, depending on the extensiveness of the analysis. Dodd, DNA Fingerprinting in Matters of Family and Crime, 26 Med. Sci. L. 5 (1986). In England, the courts have used DNA fingerprinting to establish maternity for pur-

poses of granting a boy entry into the country. Id. at 6. Genetic fingerprinting has also been used in rape cases in both England and the United States. Maugh, Genetic Fingerprinting Joins Crime War, Los Angeles Times, Jan. 7, 1988, at 3, col. 1.15/

Advances in the area of DNA testing allow accurate identification of parentage. These advances, coupled with the increased accuracy of standard blood testing procedures, render the possibility of successful prosecution of stale or fraudulent paternity claims extremely remote.

15/ On February 5, 1988, a Florida jury convicted a man of rape on the basis of genetic analysis of the DNA fingerprint in his blood. State of Florida v. Tommy Lee Andrews, CR-87, No. 1400, Ninth Judicial Circuit.

D. Pennsylvania's Six-Year Statute Of Limitations Can No Longer Be Justified As Substantially Related To A Valid State Interest In Preventing Stale Or Fraudulent Claims

In Astemborski v. Susmarski, 502 Pa. 409, 466 A.2d 1018 (1983), the Pennsylvania Supreme Court upheld the constitutionality of the six-year statute of limitations at issue in this case.

> Insofar as the requirement set forth in Mills that periods of limitation bear a substantial relation to the state's interest in avoiding litigation of stale or fraudulent claims, the Court in Pickett rejected, as it had in Mills, the argument that recent advances in blood and genetic testing have provided scientific means so highly probative in determining paternity that their existence entirely negates the state interest in preventing the assertion of stale or fraudulent claims.

Id. at 1021. The court held that the state's interest in preventing stale or fraudulent claims justified the six-year

statute of limitations, finding that the six-year period was not so truncated as to be "illusory."

The Pennsylvania Supreme Court's analysis, however is premised upon scientific evidence that is now more than a decade out-of-date. As we have seen, advances in the field of blood testing and DNA testing since 1976 have dramatically increased the probability of establishing fatherhood, and compel a rebalancing of the two factors identified by this Court in Mills.

The increased ability to determine the identity of the biological father has attenuated the state's interest in preventing stale or fraudulent claims.16/

16/ The continued significance of Pennsylvania's interest in preventing stale or fraudulent claims in these circumstances is, moreover, questionable in light of Pennsylvania's minority tolling (continued...)

That interest can no longer rationally be claimed to outweigh a child's fundamental right to support from his or her biological parents or the public's interest in reducing the state's public assistance burden.17/

> Relatively short statutes of limitations were enacted in the past in order to prevent stale claims and to protect a man from having to defend himself against a paternity action brought years after the child's birth when witnesses may have disappeared and memories may have became faulty. Recent progress in developing highly specific tests for genetic markers now permits the exclusion of over 99 percent of those wrongly accused of paternity regardless of the age of that child.

16/ (...continued)
statute, 42 Pa. Cons. Stat. Ann. § 5533(b), and inheritance statute, 20 Pa. Cons. Stat. Ann. § 2107(c)(3), which permits paternity actions after the parent has died.

17/ Moreover, the plaintiff in a paternity action still bears the burden of proof by a preponderance of the evidence. 42 Pa. Cons. Stat. Ann. §6704(g).

H.R. Rep. No. 527, 98th Cong., 1st Sess. at 38 [Child Support and Enforcement Amendments of 1984, Pub.L. No. 98-378, 98 Stat. 1305 (1984)].

Courts may indeed be "powerless to prevent the social opprobrium suffered by [non-marital] children," Weber v. Aetna Casualty & Surety Co., 406 U.S. at 176, but the Equal Protection Clause requires the invalidation of "discriminatory laws relating to status of birth where -- as in this case -- the classification is justified by no legitimate state interest, compelling or otherwise." Ibid.

CONCLUSION

For the foregoing reasons, amici respectfully urge that the judgment below be reversed, and that the six-year statute of limitations set forth in the now-

repealed Pennsylvania support statute, 42 Pa. Cons. Stat. Ann. § 6704(e), be declared unconstitutional.

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Dated: February 25, 1988

No. 87-5565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHERLYN CLARK,

Petitioner,

v.

GENE JETER,

Respondent.

On Writ of Certiorari to the Superior Court of Pennsylvania

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NEED FOR SUPPORT ENFORCEMENT;
SINGLE PARENTS UNITED 'N' KIDS;
THE SECOND HUSBANDS ALLIANCE
FOR FAIR TREATMENT;
SUPPORT;
AND THE WOMEN'S LAW PROJECT
IN SUPPORT OF PETITIONER

QUESTIONS PRESENTED

1. Does a six-year statute of limitation for actions brought to establish paternity in support actions for children born out of wedlock violate the equal protection guarantee of the Fourteenth Amendment of the United States Constitution?

2. Does a six-year statute of limitation for actions brought to establish paternity in support actions for children born out of wedlock deprive such children of the due process guaranteed by the Fourteenth Amendment of the United States Constitution?

3. Is Pennsylvania's current eighteen-year paternity statute of limitation, which has been construed to be not retroactive to cases pending on appeal or previously barred by the now repealed six-year statute, inconsistent with the language and intent of the federal Child Support Enforcement Amendments?

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On Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE [1]

The *amici* filing this brief represent a cross-section of organizations concerned about the protection and enforcement of children's rights to obtain the necessary support to which they are entitled. These groups, including professional organizations and national groups as well as grass-roots organizations, work through various

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2.

means including education, research, and advocacy to promote, *inter alia*, fairness between women and men in the area of child support and to improve laws and procedures for the establishment of paternity and the enforcement of child support.[2] The *amici* are: (1) The Women's Legal Defense Fund; (2) Children's Defense Fund; (3) Delco. C.A.P.S. Inc.; (4) Equal Rights Advocates; (5) The National Child Support Enforcement Association; (6) The National Organization for the Enforcement of Child Support; (7) The National Organization for Women; (8) The NOW Legal Defense and Education Fund; (9) The National Women's Law Center; (10) Need for Support Enforcement; (11) Single Parents United 'N' Kids; (12) The Second Husbands Alliance For Fair Treatment; (13) SUPPORT; and (14) The Women's Law Project.

Amici's specific interest in this case is based on the federal issues raised by the Pennsylvania court's interpretation of Pennsylvania law and its application of that law to a class of children seeking child support under applicable Commonwealth statutes. The ruling of the Pennsylvania Superior Court not only deprives these children of due process and equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution but also violates a federal statute designed to assist children in obtaining support.

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[2] Separate statements of interest for each *amicus* are included in an Appendix hereto.

SUMMARY OF ARGUMENT

I. Pursuant to the criteria established by *Pickett v. Brown*, 462 U.S. 1 (1983), and other cases, any statute of limitations applied to child support-related paternity actions must satisfy two criteria in order to survive equal protection scrutiny. First, the statute must provide a person who has an interest in the non-marital child with a reasonable opportunity to assert the paternity claim. A six-year statute of limitations does not provide such a reasonable opportunity since disabilities and complications—physical, emotional and economic—following the birth of a non-marital child continue and actually increase for many years following birth as the single mother tries to satisfy her child support obligation without contributions from the father.

The second criterion applied in *Pickett v. Brown* is that the statute of limitations governing a support-related paternity action must be substantially related to a valid state interest. In the instant case, the Pennsylvania court's assertion of a valid state interest in the prevention of stale and fraudulent claims is undermined by the Commonwealth's disparate statute of limitations treatment of similar paternity-related civil actions such as inheritance proceedings and actions by a putative father to establish paternity, by significant advances in blood and genetic testing, and by the fact that the six-year statute of limitations itself has been repealed and replaced with a statute extending the limitations period to eighteen years.

II. Application of the six-year statute of limitations also deprives an affected child of his or her right to receive paternal support, without the due process guaranteed by the Fourteenth Amendment. Under Pennsylvania law all children have the right to be supported by both parents at least through their minority, and this right is a constitutionally protected property interest.

Application of the six-year statute of limitations effectively deprives a child born out of wedlock of any opportunity to seek judicial enforcement of that right on his or her own behalf, and makes the enforcement of the child's right totally dependent upon action taken by the parent or guardian—action which for a number of reasons the parent or guardian may be unwilling or unable to take. Therefore, application of the six-year statute of limitations cannot be made consistent with the requirements of due process.

III. Finally, Pennsylvania's current eighteen-year statute of limitations for paternity suits, as construed as not applying to such suits brought on behalf of children who were six years of age or older on the statute's effective date, fails to comply with the Child Support Enforcement Amendments. Those Amendments require that *all* children, without qualification, be afforded an eighteen-year opportunity to prove paternity and thus secure support from both parents. Pennsylvania's election to participate in the program for Aid to Families with Dependent Children obligates the Commonwealth to comply with the federal statutes and regulations governing such programs. The Pennsylvania eighteen-year statute of limitations, as construed by the Pennsylvania Superior Court, does not comply with the federal Child Support Enforcement Amendments, and therefore is invalid by reason of the Supremacy Clause of Article VI of the United States Constitution.

ARGUMENT

I. APPLICATION OF PENNSYLVANIA'S PREVIOUS SIX-YEAR STATUTE OF LIMITATIONS FOR PATERNITY ACTIONS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IN THAT IT DEPRIVES NON-MARITAL CHILDREN OF AN ADEQUATE OPPORTUNITY TO OBTAIN SUPPORT AND IS NOT SUBSTANTIALLY RELATED TO A LEGITIMATE STATE INTEREST.

Under this Court's decisions in *Mills v. Habluetzel*, 456 U.S. 91 (1982), and *Pickett v. Brown*, 462 U.S. 1 (1983), restrictions imposed by state law on paternity actions brought on behalf of children born out of wedlock will survive equal protection scrutiny only if the following two criteria are met: (1) the period permitted by the state for obtaining support is sufficiently long so that those with an interest in non-marital children are given a reasonable opportunity to file suit; and (2) the time limitation placed on that opportunity is substantially related to the state's interest in preventing the litigation of stale and fraudulent claims.[3]

Pennsylvania's prior six-year statute of limitations in support-related paternity actions[4] fails to satisfy either of these mandatory criteria, and thus its application to

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[3] *Pickett v. Brown*, 462 U.S. at 12-13.

[4] 42 Pa. Cons. Stat. Ann. § 6704(e) (Purdon 1982), *repealed by* Act of Oct. 30, 1985, Pub. L. 264, No. 66 § 3 (Purdon Supp. 1987) provides:

> (e) *Limitation of actions.*—All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father.

a non-marital child deprives the child of the equal protection guaranteed under the Fourteenth Amendment.

A. A Six-Year Statute of Limitations Fails to Provide a Reasonable Opportunity to File a Paternity Action and Thus Unreasonably Deprives a Child of His or Her Right to Parental Support.

In *Mills v. Habluetzel* and *Pickett v. Brown*, this Court struck down one- and two-year statutes of limitation applied to child-support related paternity actions finding, *inter alia*, that such restrictive statutes fail to provide an adequate opportunity to file a paternity claim. In a concurring opinion in *Mills*, Justice O'Connor, joined by three other members of this Court, suggested that "longer periods of limitation for paternity suits also may be unconstitutional." *Mills v. Habluetzel*, 456 U.S. at 106.[5]

"[P]ractical obstacles to filing suit within one year of birth could as easily exist several years after the birth of the illegitimate child." *Mills v. Habluetzel*, 456 U.S. at 105 (O'Connor, J., concurring). Indeed, the emotional and financial strain which accompanies and immediately follows childbirth may not only remain constant but increase during subsequent years of child rearing.[6] As

[5] *Accord, State ex rel. Adult & Family Serv. Div. v. Bradley*, 58 Or. App. 663, 650 P.2d 91 (1982), *aff'd*, 295 Ore. 216, 666 P.2d 249 (1983) (striking down a six-year statute of limitations); *Alexander v. Commonwealth*, 708 S.W.2d 102 (Ky. App. 1986) (four-year statute); *Smith v. Cornelius*, 665 S.W.2d 182 (Tex. App. 1984) (same); *Moore v. McNamara*, 40 Conn. Sup. 6, 478 A.2d 634 (1984) (three-year statute).

[6] "The mother may experience financial difficulties caused not only by the child's birth, but also by a loss of income attributable to the need to care for the child." *Pickett v. Brown*, 462 U.S. at 12. *Accord, State ex rel. Adult & Family Serv. Div. v. Bradley*, 58 Or. App. at 668-69, 650 P.2d at 94; *Callison v. Callison*, 687 P.2d 106, 109 (Okla. 1984); *District of Columbia ex rel. W.J.D. v. E.M.*, 467 A.2d 457, 463 (D.C. App. 1983); *Jude v. Morrissey*, 117 Ill. App. 3d 782, 783, 454 N.E.2d 24, 25 (1983).

children grow older, they become an ever-increasing financial burden, the severity of which may be appreciated fully by a single mother only after a six-year statute of limitations has expired.[7]

Similarly, although the emotional stress surrounding the child's birth will eventually subside, continuing tension may characterize the relationship between the mother and putative father. Mothers hoping to effect a reconciliation, or those fearing abuse, may be deterred from filing paternity suits for fear of incurring the wrath of the putative father.[8] If the father is making sporadic income payments, single mothers may be lulled into a false sense of security subsequently shattered when the payments cease and the father disappears.[9]

Other pressures incidental to the administration of public welfare programs can contribute to the mother's

[7] At six years of age a child enters school, and the mother typically incurs increased expenses such as educational materials, clothes and doctor visits. *See Moore v. McNamara*, 478 A.2d at 637 (mother may be able to shoulder burden until child is five or ten years old but if she loses job, will be foreclosed by limitation from establishing paternity); *District of Columbia ex rel. W.J.D. v. E.M.*, 467 A.2d 457 (D.C. App. 1983) (same).

[8] *State ex rel. Adult & Family Serv. Div. v. Bradley*, 58 Or. App. at 669, 650 P.2d at 95 (mother might still feel an attachment to the father; mother might not want to take the risk that bringing suit will cause father to cut off communication with child); *District of Columbia ex rel. W.J.D. v. E.M.*, 467 A.2d 457, 463 (D.C. App. 1983) (ongoing harmonious relationship as well as the hope of obtaining voluntary cooperation or desire to avoid retribution may make legal action unlikely).

[9] In such cases, "an action may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father." 42 Pa. Cons. Stat. Ann. § 6704(e) (Purdon 1982). Such a short time limitation is unrealistic in many circumstances for many of the same reasons that a limitations period of two years from birth is unrealistic. *See Pickett v. Brown*, 462 U.S. at 12-13 (financial difficulty from loss of income, continuing affection for child's father, desire to avoid family and community disapproval).

uncertainty and confusion. In the instant case, following Petitioner's application for assistance to the Pennsylvania Department of Public Welfare, the case worker neglected to inform her that she was required to file a separate paternity claim. By the time another case worker discovered the error, Petitioner was barred from further action. Given the Petitioner's lack of education about these procedures—and the bureaucratic backlog typical of many welfare programs—it is unrealistic to believe that six years provided reasonable opportunity to establish paternity.[10]

B. A Six-Year Statute of Limitations Is Not Substantially Related to Pennsylvania's Interest in Preventing the Litigation of Stale and Fraudulent Claims.

The second equal protection criterion stated by this Court requires that a statute of limitations in a support-related paternity action be substantially related to a valid state interest—namely, the prevention of stale and fraudulent claims. *Pickett v. Brown*, 462 U.S. at 13. The state's underlying concern is with those problems of proof posed by stale evidence. A state's claim of substantial relation is undermined by a showing of disparate state treatment of similar claims. *Id.* at 14-15.

For example, this Court in *Pickett v. Brown* noted the contradiction between Tennessee's minority tolling provision and its support-related paternity statute of limitations. It pointed out that:

> Many civil actions are fraught with problems of proof, but [the state] has chosen to overlook these problems in most instances in favor of protecting the interests of minors. In paternity and child support actions brought on behalf of certain illegitimate children, however, the State instead has chosen to focus on the problems of proof and to impose on these suits a short limitations period.

462 U.S. at 16.[11]

In Pennsylvania, as in Tennessee, a minority tolling statute provides that civil actions which otherwise may be brought by a child but for its minority status are tolled throughout the period of minority.[12] It is therefore inconsistent to assert that, in the case of support-related paternity actions governed by the six-year statute of limitations, problems of proof are too intractable to be left to the trier of fact.[13]

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[10] *Cf. District of Columbia ex rel. W.J.D. v. E.M.*, 467 A.2d 457, 464 (D.C. App. 1983) (volume of public assistance related support claims frequently prevents the government from acting with sufficient promptness to avoid the statutory bar).

[11] In their concurring opinions in *Mills v. Habluetzel*, 456 U.S. at 104-06, Justices O'Connor and Powell both found it "significant" that paternity suits were one of the few causes of action in Texas not tolled during the plaintiff's minority, implicitly suggesting that such a situation may be among the vestiges of the irrational discrimination against non-marital children struck down by the Court in numerous decisions over the last twenty years.

[12] The tolling provision in 42 Pa. Cons. Stat. Ann. § 5533(b) (Purdon Supp. 1987), adopted in May 1984, provides as follows:

> (b) Infancy. If an individual entitled to bring a civil action is an unemancipated minor at the time the cause of action accrues, the period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the same time for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter. As used in this subsection the term "minor" shall mean any individual who has net yet attained the age of 18.

[13] Prior to adoption of this tolling provision in 1984, Pennsylvania provided for the tolling of statutes of limitation during minority only in limited circumstances. Thus, the Pennsylvania Supreme Court in upholding its six-year statute of limitation for paternity actions concluded that "in Pennsylvania, paternity actions are treated no differently from the vast majority of actions brought on behalf of a child." *Astemborski v. Susmarski*, 502 Pa. 409, 416-17 n.3, 466

Similarly, the fact that Pennsylvania imposes no statutory limitations period on fathers seeking to establish paternity [14] undermines the assertion that Pennsylvania's six-year statute is substantially related to the Commonwealth's interest in preventing stale and fraudulent claims. Even more surprisingly, the Commonwealth allows paternity actions to be brought by offspring of any age pursuant to inheritance proceedings.[15] Such proceedings may occur many years after the child's birth and will often occur when the father is no longer present to contest paternity.[16] Indeed, problems of proof increase over time in the case of inheritance proceedings. However, notwithstanding the possibility that stale evidence will be introduced in such proceedings, or that fraudulent claims will be filed once the father is deceased, Pennsylvania does not prohibit inheritance-related paternity suits, but allows the trier of fact to decide on the admissibility of evidence. Finally, the Pennsylvania legislature's conscious choice to enact the current eighteen-year statute of limitations for paternity actions, 23 Pa. Cons. Stat. Ann. § 4343(b), deals the fatal blow to any claim of legitimate state interest in maintaining the six-year limitations period.

A.2d 1018, 1021 n.3 (1983). Pennsylvania's subsequently-enacted minority tolling statute undermines the continuing validity of that conclusion.

[14] *See In Re Mengel*, 287 Pa. Super. 186, 429 A.2d 1162 (1981); *Commonwealth ex rel. Goldman v. Goldman*, 199 Pa. Super. 274, 184 A.2d 351 (1962).

[15] 20 Pa. Cons. Stat. Ann. § 2107(c)(3) (Purdon Supp. 1987). The relevant portion of the statute reads as follows without any reference to a statute of limitations:

> (c) Child of Father.—For purpose of descent by, from and through a person born out of wedlock, he shall be considered the child of his father when the identity of the father has been determined in any one of the following ways:
>
> . . .
>
> (3) If there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity.

[16] Although Pennsylvania's clear and convincing evidentiary standard in inheritance claims is more strict than the preponderance of the evidence standard applied to support-related paternity actions, the evidentiary problems posed by stale evidence do not disappear under either standard. Thus, *amici* do not advocate that the clear and convincing standard can or should be applied to support-related paternity actions. *See Rivera v. Minnich*, 107 S. Ct. 3001 (1987) (upholding constitutionality of Pennsylvania's statute requiring proof by a preponderance of the evidence in support-related paternity actions).

In addition, the State's valid interest in preventing stale and fraudulent claims may be adequately served by scientific developments in the field of paternity testing. Increasingly sophisticated blood tests, such as the Human Leukocyte Antigen (HLA) white blood cell test, and a number of other genetic typing tests, have radically changed the evidentiary ground rules in cases of disputed parentage.[17] *See Rivera v. Minnich*, 107 S. Ct. 3001, 3008 (1987) (Brennan, J., dissenting) (noting that modern blood-grouping tests, including HLA tests, can provide an "extremely reliable means of determining paternity"); *Pickett v. Brown*, 462 U.S. at 17 (suggesting that "advances in blood testing render more attenuated the relationship between a statute of limitations and the State's interest in preventing the prosecution of stale or fraudulent paternity claims"). Before the HLA test was developed, blood tests typically were admissible only to exclude an alleged father from that group of males who could have fathered a child. With the development of HLA testing, blood tests now can be used with great accuracy to establish paternity.[18] Pennsylvania has rec-

[17] Kolko, *Admissibility of HLA Tests to Determine Paternity*, 9 Fam. L. Rep. (BNA) 4009 (1983).

[18] Kolko, *Admissibility of HLA Tests to Determine Paternity*, 9 Fam. L. Rep. (BNA) 4009 (1983). *See also* Castillo, *New Use of*

ognized that HLA testing can be used reliably to calculate the probability that a putative father is the actual father of a child. *Turek v. Hardy*, 312 Pa. Super. 158, 160-64, 458 A.2d 562, 563-65 (1983).

Developments in HLA and genetic testing did not go unnoticed by Congress when the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984), were adopted. According to the House Report:

> Relatively short statutes of limitations were enacted in the past in order to prevent stale claims and to protect a man from having to defend himself against a paternity action brought years after the child's birth when witnesses may have disappeared and memories may have become faulty. Recent progress in developing highly specific tests for genetic markers now permits the exclusion of over 99 percent of those wrongly accused of paternity regardless of the age of the child. *These advances in scientific paternity testing eliminate the rationale for placing arbitrary time limitations on the establishment of paternity for a child and therefore the obligation to support that child.*

H.R. Rep. No. 527, 98th Cong., 1st Sess. at 38 (1983) (emphasis added).

Finally, the state's interest in the prevention of stale and fraudulent claims is undercut by countervailing state interests in ensuring that justice is done by satisfying genuine claims for child support, *Mills v. Habluetzel*, 456 U.S. at 103 (O'Connor, J., concurring), and by reducing the state's welfare burden by securing child

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Blood Tests is Decisive in Paternity Suits, N.Y. Times, June 2, 1981, at A1, col. 1; Shroud, Sussman & Gilsa, *Blood Grouping Tests for Paternity and Nonpaternity*, 1981-1 N.J. St. J. Med. 343 (1981) (HLA in conjunction with other blood tests can lead to statistical probability of paternity approaching 100 percent). *See generally* Johnson, *DNA 'Fingerprinting' Tests Becoming a Factor in Courts*, N.Y. Times, Feb. 7, 1988, at 1, col. 1.

support from fathers otherwise obligated to provide such support. *Id.*

II. APPLICATION OF PENNSYLVANIA'S PREVIOUS SIX-YEAR STATUTE OF LIMITATIONS FOR PATERNITY ACTIONS DEPRIVES A NON-MARITAL CHILD OF DUE PROCESS.

The Fourteenth Amendment of the United States Constitution prohibits a state from depriving any person of liberty or property without due process of law. Determining whether a state has acted to deprive a person of due process requires a two step analysis. First, it must be shown that the interest affected by state action is a liberty or property interest cognizable as such under the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Second, it must be shown that the person has been deprived of his or her liberty or property interest without "due" process. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

A. A Non-Marital Child's Right to Parental Support Is a Constitutionally Protected Property Interest.

Where an unconstitutional deprivation of property is alleged, this Court has required a showing that a property interest is actually conferred. *Board of Regents v. Roth*, 408 U.S. 564 (1972). "To have a property interest . . . a person clearly must have more than . . . a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577. The protected property interest is not created by the Fourteenth Amendment. Rather, it is created and its dimensions defined "by existing rules or understandings that stem from an independent source such as state law . . . ." *Id.*

All children in Pennsylvania have a right to support, enforceable against both parents, throughout their minority. *See Costello v. Le Noir*, 462 Pa. 36, 40, 337 A.2d

866, 868 (1975); *Conway v. Dana*, 456 Pa. 536, 538, 318 A.2d 324, 325 (1974); 23 Pa. Cons. Stat. Ann. § 4321(2), (3) (Purdon Supp. 1987). Increasingly, the child's right to receive support has been regarded as a property right. *See DeSantis v. Yaw*, 290 Pa. Super. 535, 540, 434 A.2d 1273, 1275 (1981). Moreover, a child born out of wedlock has a right to receive support from his or her parents equivalent to the right of support enjoyed by children born of married parents. *See, e.g., Gomez v. Perez*, 409 U.S. 535 (1973); *Commonwealth v. Rebovich*, 267 Pa. Super. 254, 258, 406 A.2d 791, 793 (1979). Thus, a child in Pennsylvania has "more than a unilateral expectation" of support. *Board of Regents v. Roth*, 408 U.S. 564. Rather, the child's support right is an entitlement created by state law, and protected by the Fourteenth Amendment.

B. Pennsylvania's Previous Six-Year Statute of Limitations Does Not Provide Due Process Protection for the Child's Right to Parental Support.

Once a protected property interest is established, inquiry proceeds to determine what process is due to the property claimant before he or she may be constitutionally deprived of the interest. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Determination of what process is due requires a balancing of three factors, including (1) the private interest affected by official action; (2) the risk of erroneous deprivation through procedures used and the probable value of additional or substitute procedures; and (3) the government's interest, including the fiscal or administrative burdens imposed by additional or substitute procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

When determining what process is due, it is not sufficient to show that the state has provided some procedure and that that procedure was followed in the case at hand.

Thus, although a state legislature may create an entitlement pursuant to statute, the legislature cannot prescribe procedures for enforcing the right so created which do not meet due process standards. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). As this Court has declared:

> The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. . . . "While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)).

Applying the balancing test developed in *Mathews v. Eldridge*, it is clear, first, that the child's right to support from both parents throughout his minority is a significant interest, recognized as such by the state. Moreover, the child's physical and emotional well-being may be affected directly by the father's failure to provide needed support, particularly if, as is commonly the case, the child must then be supported at public expense.[19] The putative father's countervailing interest in

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[19] *See* 130 Cong. Rec. S9589 (Aug. 1, 1984) (statement of Sen. Moynihan):

> There is a strong link between female-headed households, poverty, welfare recipiency and child support. The Census Bureau reports that 19 percent of all families with children are headed by women—and 12.5 million children under age 8 live in female-headed households; 59 percent of the black poverty population lived in female-headed families in 1980. Between 1970 and 1981 the number of these households increased over 100 percent. Poverty rates among women heading households are much

being free of the risk of stale or fraudulent paternity claims is substantially weakened by the factors previously discussed and, in any case, does not rise to the level of importance of the child's interest.

Second, there is a substantial risk that the child will be erroneously deprived of his support right under existing procedures. The child's right to support can be lost if someone fails timely to act on his behalf, without regard to whether a putative father has been identified who has the ability and the continuing obligation to support the child.

Third, and finally, the fiscal and administrative burdens imposed on the state by allowing paternity suits to be brought by or on behalf of the child beyond the six-year period cannot outweigh the importance of the child's interest and the risk of its deprivation.[20] Indeed, any additional costs to the state which might be incurred by reason of a more crowded court docket resulting from a longer limitations period may very well be offset by the

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higher than for male heads of households and husband-wife couples; 52 percent of all children in female-headed families had incomes below the poverty line, compared with 11 percent of children living in married couple families. Lack of child support from the absent parent, which occurs in over 50 percent of all cases where child support is due, is a compelling explanation for the preponderence [sic] of poverty in single-parent female-headed households and the substantial numbers of such families who become part of the welfare system.

Accord, 130 Cong. Rec. H9980 (Nov. 16, 1983) (statement of Rep. Schroeder); 130 Cong. Rec. S4809 (Apr. 25, 1984) (statement of Sen. D'Amato) ("Almost 90 percent of all child welfare recipients owe their welfare eligibility to the failure of parents to pay child support."); *id.* at S4811 (statement of Sen. Bradley).

[20] As discussed below, the statute of limitations in Pennsylvania already has been extended to eighteen years for all children not yet six years of age in January, 1986. The increase in expense attributable to cases such as Petitioner's is unlikely to be great and will abate over time.

reduction in the state's welfare burden resulting from compelling fathers to satisfy their support obligation.[21]

III. PENNSYLVANIA'S CURRENT EIGHTEEN-YEAR STATUTE OF LIMITATIONS FOR PATERNITY ACTIONS, AS CONSTRUED BY THE SUPERIOR COURT OF PENNSYLVANIA, IS IN CONFLICT WITH THE FEDERAL CHILD SUPPORT ENFORCEMENT AMENDMENTS.

A. The Federal Child Support Enforcement Amendments Require That a State Have in Place Procedures Which Permit the Establishment of the Paternity of Any Child at Least Until the Child's Eighteenth Birthday.

Congress enacted the 1984 Child Support Enforcement Amendments ("Amendments")[22] to improve the effectiveness of already existing child support programs and "to assure that all children in the United States who are in need of assistance in securing financial support from their parents will receive such assistance."[23] The Amend-

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[21] *See* 130 Cong. Rec. S9589 (Aug. 1, 1984) (statement of Sen. Moynihan):

Let us consider one more illustration of the pervasiveness and complexity of the situation regarding the enforcement of child support obligations. For all women with incomes below the poverty line, only 60 percent received some amount of child support payment, and then the average annual payment received was just $1,440. In other words, the custodial parent received just $120 a month an [sic] average from the absent parent to support their child. If each family with no father present receiving AFDC in December 1982 had received just that $1,400 average annual payment, the savings in welfare payments would have been close to $5 billion, rather than $800 million.

[22] Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified at 42 U.S.C. §§ 651 *et seq.*).

[23] 130 Cong. Rec. H9974 (Nov. 16, 1983) (remarks of Rep. Rostenkowski). *See also* 130 Cong. Rec. S4802-03 (Apr. 25, 1984) (remarks of Sen. Dole).

ments require that, to remain in compliance with the program for Aid to Families with Dependent Children ("AFDC"), Title IV, Part A of the Social Security Act, 42 U.S.C. §§ 601 *et seq.* (1982), each state must adopt "[p]rocedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday." 42 U.S.C. § 666(a)(5) (Supp. III 1985). By its plain language, this provision requires states to permit paternity actions at *any* time before a child reaches age eighteen. It provides no exclusion for claims which already would have been barred by lesser statutes of limitation.[24] The critical point of the Amendments, as Representative Roukema eloquently put it, was to place "the Federal Government firmly on record that child support is not a voluntary commitment, but a legal as well as moral obligation." 130 Cong. Rec. H9982 (Nov. 16, 1983).

Senator Dole, echoing the concerns of a number of his Senate and House colleagues, pointed out that

> Every year the parents of 1.2 million children are divorced and another 700,000 children are born out of wedlock. Incredibly, half of the children born this year [1984] are expected to live in single parent families before age 18. This disturbing trend has led to a rapid increase in the number of child support and paternity cases . . . .

[24] This Court has long held that statutes of limitations are procedural, rather than substantive, rights. *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 311-12 (1945) ("[A] state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar."). Therefore, Congress' requirement that the longer limitations period be made available to *all* children suffers from no constitutional infirmity. *See also International Union of Electrical, Radio & Machine Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229, 243 (1976).

130 Cong. Rec. S4802 (Apr. 25, 1984).[25] Congress recognized that many single women and their children were already, or would become, public charges unless effective legislation were enacted to compel fathers, especially, to meet their support obligations.[26]

Restrictive state statutes of limitations in paternity actions were seen as stumbling blocks to the effectiveness of such legislation. As the House Ways and Means Committee report noted, "if a State's applicable statute of limitation does not permit establishment of paternity past the child's second, sixth or other birthday, it will be impossible ever to establish support orders on behalf of children past these ages and therefore impossible to obtain support for them." Therefore, the Amendments unambiguously required that:

> procedures under applicable State paternity laws must permit the establishment of an individual's paternity for *any* child *at least* until the child's eighteenth birthday. . . . States could eliminate statutes of limitation for establishing paternity altogether if they wished.

H.R. Rep. No. 527, 98th Cong., 1st Sess. 1, at 38 (1983) (emphasis added). By requiring compliance with this provision by all states sharing in federal funding for the AFDC program, Congress intended to "assure that *all* children in the United States who are in need of assistance in securing financial support from their parents will receive such assistance." 130 Cong. Rec. H9974 (Nov. 16, 1983) (statement of Rep. Rostenkowski) (emphasis added).[27]

[25] *See also id.* at S4811 (statement of Sen. Bradley); 130 Cong. Rec. at S9585 (Aug. 1, 1984) (Sen. Long); 130 Cong. Rec. H9974 (Nov. 16, 1983) (Rep. Conable); *id.* at H9978 (Rep. Biaggi); *id.* at H9980 (Rep. Schroeder).

[26] 130 Cong. Rec. at S9589 (Aug. 1, 1984) (statement of Sen. Moynihan).

[27] States which failed by a specified date to adopt mandatory procedures—including the eighteen-year statute of limitations—

Indeed, the intent of Congress to provide relief to all children, without restriction, was so evident that the United States Department of Health and Human Services ("HHS"), in adopting federal regulations implementing the Amendments, stated that elaboration on the eighteen-year statute requirement was not necessary "[s]ince it is clear that cases previously considered to be closed because of the child's age will now have to be reopened and services provided." [28] 50 Fed. Reg. 19608, 19631 (1985).

B. Pennsylvania's Eighteen-Year Statute of Limitations, as Construed, Is in Conflict With the Federal Child Support Enforcement Amendments.

On October 30, 1985, the Pennsylvania legislature enacted, as Congress had mandated, a new eighteen-year statute of limitations for paternity suits, which provides that "[a]n action or proceeding under this chapter to establish the paternity of a child born out of wedlock

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would lose federal child support enforcement funds and a significant share of federal AFDC funds. 42 U.S.C. §§ 603(h), 655(a) (Supp. III 1985). It is, of course, established that the federal government may prescribe conditions for state participation in federally-funded programs. *See, e.g., King v. Smith*, 392 U.S. 309 (1968).

[28] As the federal agency charged with enforcing the Child Support Enforcement Amendments, the position of HHS on this issue is entitled to substantial deference. *See Connecticut Dept. of Income Maintenance v. Heckler*, 471 U.S. 524 (1985); *Blum v. Bacon*, 457 U.S. 132, 141 (1982).

In that regard, the Family Welfare Reform Act of 1987 (H.R. 1720), currently pending in Congress, would, among other things, "clarify that the authority to establish paternity until the child is 18, included in the 1984 amendments, applies to every child . . . including those for whom a paternity action was brought but dismissed because a statute of limitations of less than 18 years was then in effect in the State." H.R. Rep. No. 100-159, 100th Cong., 1st Sess. at 72 (1987).

must be commenced within 18 years of the date of birth of the child." [29] Section 4343(b) was part of a package of support program reforms designed to bring Pennsylvania into compliance with the federal Amendments and thereby prevent Pennsylvania from losing federal reimbursement funds provided for the support programs.[30] A prepared statement by Pennsylvania State Senator Greenleaf which was read into the record at the time of passage of the reform package emphasized that the legislation had been passed for "federal money and to better provide for our families." Pennsylvania Legislature Journal-Senate, October 9, 1985, at 1099.

In light of the clear language of Congress in requiring states to "permit the establishment of the paternity of *any* child *at any time* prior to such child's eighteenth birthday," 42 U.S.C. § 666(a)(5) (emphasis added), and in light of Congress' stated intent to compel all fathers to meet their support obligations, it follows that, in order to comply with the requirements of the federal Amendments, the eighteen-year statute of limitation must be applicable as well to paternity actions brought by or on behalf of children who were older than six years of age when the eighteen-year statute was enacted. If the statute cannot be so applied, it operates to withhold the benefits of the Pennsylvania statute—and thus the federal statute—from all such non-marital children. Thus, Pennsylvania will not have met the requirements of the

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[29] 23 Pa. Cons. Stat. Ann. § 4343(b) (Purdon Supp. 1987). The statute of limitations previously in effect, 42 Pa. Cons. Stat. Ann. § 6704(e) (Purdon 1982), was repealed.

[30] That the federal Amendments, and specifically 42 U.S.C. § 666(a)(5), were the "motivating factor for passage of § 4343(b)" was specifically recognized by the Pennsylvania Superior Court in *Paulussen v. Herion*, 359 Pa. Super. 520, 524, 519 A.2d 473, 475 (1986), *appeal denied*, 530 A.2d 868 (Pa. 1987).

federal Amendments—that *all* children be permitted to establish paternity at any time throughout their minority—until 1996.[31]

The Pennsylvania Superior Court, in this case and other cases, has uniformly construed the eighteen-year statute of limitation as being inapplicable to paternity suits brought by or on behalf of children where such suits, as of the effective date of that statute, were barred by the prior six-year statute of limitation. *Clark v. Jeter*, 358 Pa. Super. 550, 554, 518 A.2d 276, 278 (1986), *appeal denied*, 527 A.2d 533 (Pa. 1987), *cert. granted*, 56 U.S.L.W. 3459 (1988). *See Nichols v. Horn*, 363 Pa. Super. 301, 305, 525 A.2d 1242, 1244 (1987); *Paulussen v. Herion*, 359 Pa. Super. at 524, 519 A.2d at 475.[32]

Section 4343(b), as thus construed, fails to comply with the Amendments, and thwarts clear Congressional intent to benefit "all children" and to remove bars to valid paternity claims.

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[31] The federal program was intended to be in effect in all states by 1986. Pub. L. 98-378 § 3(g)(1), (3).

[32] In refusing to give effect to the eighteen-year statute of limitations in this case, the Pennsylvania Superior Court cited the Pennsylvania statutory presumption against retroactive construction, 1 Pa. Cons. Stat. Ann. § 1926 (Purdon Supp. 1987), as well as the Pennsylvania legislature's failure to make express provision for retroactive effect in the language of the new limitations provision. *Clark v. Jeter*, 358 Pa. Super. 550, 553, 518 A.2d 276, 278 (1986). Although the court appeared to concede that a "clear and manifest" intent could also be found in a statute's legislative history, the court found no such legislative history here—thus completely failing to recognize the essential link between the enactment of the new limitations period and the federal Amendments. By ignoring the federal Amendments, it misconstrued the Pennsylvania legislature's manifest intent in enacting the eighteen-year limitation period.

C. Pennsylvania's Eighteen-Year Statute of Limitations, As Construed, Violates the Supremacy Clause of the Constitution.

States are not obligated to participate in the federal AFDC program. Once a state chooses to do so, however, it is obliged to conform to the legislative and regulatory requirements of that program. *See Townsend v. Swank*, 404 U.S. 282, 286 (1971); *King v. Smith*, 392 U.S. 309, 316-17 (1968). A participating state's statute that conflicts with the legislative and regulatory requirements of the federal AFDC program, in the absence of clear Congressional authorization for any deviation, is invalid under the Supremacy Clause of the United States Constitution. *See Blum v. Bacon*, 457 U.S. 132, 138, 145-46 (1982); *Townsend v. Swank*, 404 U.S. at 286; *King v. Smith*, 392 U.S. at 333 n.34. Here, section 666(a)(5) is set forth in mandatory terms: "each State *must* have in effect laws requiring the use of the following procedures . . . ." (emphasis added).[33] Section 4343(b), as construed, conflicts with that mandatory provision and the limitation resulting from that construction is therefore invalid.

Moreover, a state statute also is invalid under the Supremacy Clause if it denies rights granted by federal law,[34] or if it obstructs the full effectiveness of the federal law.[35] *See Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714, 722 (1963). Thus, in *King v. Smith*, 392 U.S. 309 (1968), this Court found that an Alabama regulation violated the

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[33] The treatment of section 666(a)(5) can be contrasted with that of sections 666(a)(3), (4), (6), and (7), where the states are given some discretion as to whether to apply those procedures in a given case. 42 U.S.C. § 666(a).

[34] *See, e.g., United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 75 (1956).

[35] *See, e.g., Hill v. Florida ex rel. Watson*, 325 U.S. 538, 542 (1945).

Supremacy Clause by excluding from AFDC eligibility certain children eligible for benefits under federal standards. *Id.* at 332-33. Similarly, in *Townsend v. Swank*, 404 U.S. 282 (1971), the Supremacy Clause was held to invalidate an Illinois statute and regulation under which children between the ages of 18 and 20 who were attending high school or vocational school qualified for AFDC benefits, but children of the same age attending a college or university did not. *Id.* at 285.

The current Pennsylvania statute of limitations for paternity suits, as construed and applied by the Pennsylvania courts, clearly obstructs the full effectiveness of the federal Amendments and frustrates the intent of Congress, in enacting the Amendments, to provide aid to *all* children needing help. 130 Cong. Rec. H9974 (Nov. 16, 1983) (statement of Rep. Rostenkowski). Under Pennsylvania law, as construed below, all non-marital children who were six years old or older on the statute's effective date are prevented from ever bringing suit to establish the paternity of, and thus obtain support from, their putative fathers. The Pennsylvania statute thus deprives Petitioner's child and many other Pennsylvania children of the benefits of the federal Child Support Enforcement Amendments, and obstructs the full effectiveness of the AFDC program as expressed in the federal Amendments. It is therefore invalid under the Supremacy Clause of the United States Constitution.

CONCLUSION

Despite the mandate of the federal statute, Pennsylvania's statute of limitations for paternity actions, as construed by the Superior Court, leaves a class of children—those at least six years of age in January, 1986—forever barred from bringing actions to secure their right to child support. For the reasons stated above, neither that statute nor the previous six-year statute of limitations can operate to bar the Petitioner's suit here. The judgment should below be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

The Women's Legal Defense Fund ("WLDF") is a tax-exempt organization which represents women and men challenging barriers to sexual equality. Because of the high rate of poverty among single women and their children, WLDF is particularly concerned with legal issues relating to, and engages in education and advocacy designed to promote and protect, the rights of such individuals. In particular, WLDF has instituted a National Project to Improve Child Support Enforcement to ensure that women and men share equally in the financial obligations of child support, and that women and children do not suffer from inadequate child support enforcement. WLDF regularly represents the interests of single women and their children, and other individuals, before the courts and the United States Congress. Such representation constitutes an important aspect of WLDF's activities and includes participation as amicus curiae in significant cases before this Court.

The Children's Defense Fund ("CDF") is a national public charity representing and providing advocacy on behalf of America's children, especially low-income, minority, and handicapped children. CDF works through litigation, public education, analysis of public policy and other methods to improve the care and development of children and their economic status. Experience in such work demonstrates that special limitations on the right of children born out of wedlock to establish child support obligations, such as the Pennsylvania statute at issue, have a host of grave social and economic consequences for such children. (*See, e.g., Trimble v. Gordon*, 430 U.S. 762 (1977) (state gave no right to intestate succession); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973) (state gave no right to welfare to some children born out of wedlock). *See also* Marcus, *Equal Protection: The Custody of the Illegiti-*

mate Child, 11 J. Fam. L. 1, 17-18 (1971) (alienation of such children).)

Delco. C.A.P.S. Inc. was formed by persons not receiving their child support through Delaware County (Pa.) Domestic Relations. At that time, the organization was basically a support group. When meetings became more frequent, to monthly, the organization also began to provide educational programs, self-help guidance, court accompaniment, referrals and court monitoring. We began advocacy work by contacting judges, D.R.O. staff and elected officials to suggest and support proposed changes to improve child support enforcement, visitation problems, resolution of such, court forms and procedures and child support determinations. We plan to continue all of these activities. As well, we want to become an officially recognized and fully involved part of the domestic relations office, perhaps in a citizen's advisory capacity as court monitors and as liaisons between the courts and the litigants. We will be one year old in March of 1988. There are roughly 200 members from cases twenty years old to new cases filing for support, from declaration of paternity through the support court and custody as well as visitation.

Equal Rights Advocates is a San Francisco-based non-profit legal and education corporation dedicated to enforcing and promoting equal rights under the law for women. ERA has a long history of activism in the courts and community on issues that affect women's ability to support themselves and their families. ERA is particularly concerned that inability to obtain child support benefits for children born out of wedlock will further accelerate the feminization of poverty.

The National Child Support Enforcement Association is a non-profit national membership organization of child support professionals working to increase the nation's awareness of families in need of support enforcement. Members include judges, court masters, administrative

hearing officers, attorneys, representatives of parent advocacy groups, state and local program administrators and workers, family support councils, members of state child support enforcement commissions, private corporations, and others. Dedicated to promoting and protecting the well-being of children and their families by improving the efficient and effective enforcement of support, NCSEA is a voice for child support professionals at all levels of government and from all 50 states. NCSEA is concerned with implementing and improving laws, policies, and practices for securing adequate support for children.

The National Organization for the Enforcement of Child Support, Inc. (OECS) was founded in 1979 to educate its constituents, the judiciary, the legislatures, and the general public about the problems of child support enforcement, and to seek solutions to those problems. It is now an internationally recognized group, operating from headquarters in Maryland. OECS has given assistance to approximately 50,000 people internationally, and has responded to inquiries from two foreign governments. The organization's interest in the issue of paternity establishment stems from the premise that a child is a product of two parents. This fact is irrefutable—without regard to the child's age or the length of time which elapsed sans support. The genes of both parents are present in this new entity. The fact that an arbitrary time limit has been set on the legal establishment of the origins of these genes is a violation of the birthright of every child ever born.

The National Organization for Women (NOW), which was founded in 1966, is the largest feminist organization in the United States, with a membership of over 160,000 women and men in more than 750 chapters throughout the country. Since its beginning, NOW has been dedicated to the advancement of the rights and interests of women in American society, and has partici-

pated across the nation in court litigation and in legislative efforts to achieve equal rights and fair treatment for women. NOW has a special interest in and familiarity with the issues raised by this case, having worked for passage of the Child Support Amendments and for fair and equitable state-by-state enforcement of that law.

The NOW Legal Defense and Education Fund ("NOW LDEF") is a not-for-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by Leaders of the National Organization for Women, a membership organization of over 170,000 women and men in more than 725 chapters throughout the country. Family law, and, in particular, the economic rights of women in the family sphere are a major focus of NOW LDEF's work. The organization has filed amicus curiae briefs on family law issues in numerous cases in state and federal courts. Cases in which NOW LDEF has filed amicus curiae briefs before this Court include: *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) and *McCarty v. McCarty*, 453 U.S. 210 (1981). NOW LDEF has recently completed and presented to Congress a study of the implementation by the states of the Child Support Enforcement Amendment of 1984, and an important finding of the study is that one of the most difficult areas of enforcement is the establishment of paternity.

The National Women's Law Center ("NWLC") is a national legal organization that works to advance and protect women's rights, primarily through litigation, advocacy, research, and public education. NWLC's efforts are concentrated in areas of central concern to women, including employment, education, income security and family support, with special attention given in all areas as to how poor women are affected. NWLC has worked for several years to improve laws and procedures for the

establishment of paternity and enforcement of child support. Laws that limit the right of children born out of wedlock to establish child support obligations, such as the Pennsylvania statute at issue here, are of particular concern to NWLC because of their detrimental effect on the efforts of women and children to obtain much-needed child support payments.

Need for Support Enforcement was founded in 1982 to help custodial parents collect child support; to act as an informational resource center to identify information and individuals that will help our members make better use of support enforcement agencies; and to seek improvements in the collection system through improved legislation and enforcement of existing and future laws. N. for S.E. has chapters in western Washington with a membership of over 1,000 members. We have several members involved in paternity cases.

Single Parents United 'N' Kids is a non-profit organization founded in May of 1982 and is comprised of men and women concerned with child support enforcement. We help approximately 2,000 to 3,000 people per year with child support problems. The purpose of Single Parents United 'N' Kids is to inform and educate custodial parents of their rights, including existing and new laws, and to bring knowledge of the problem to the public's attention, while attempting to reinforce existing child support laws. About one fourth of the people who contact us have paternity problems. Many of the mothers are not aware that they have to do something to legally establish paternity; do not have money to hire an attorney if they do know; or have had cases through their local Child Support offices for years with nothing being done on behalf of the child to establish paternity. In summary many times if there is no paternity action taken it is not the fault of the mother. We believe it is important that all children be entitled to establishment of paternity up to age 18 regardless of when their case was

filed and that any statute of limitations violates the equal protection and due process clauses of the U.S. Constitution.

The Second Husbands Alliance For Fair Treatment (SHAFFT) was established in 1986 as a stepfathers' organization to assist and educate its constituency and the general public in the problems arising from non-support of children. Based in Maryland, there are members in several states. SHAFFT is presently studying existing laws to evaluate the rights of children in step-household situations. Many of these children are non-marital, with no paternity established. These children find it impossible to get support from their biological male parents. Also, this status presents difficulties in adoption procedures. Placing a time limit on establishing paternity compounds these difficulties and allows irresponsible fathers to legally shirk their moral duty. This limit, however, does not negate the biological fact of fatherhood. That does not change in the lifetime of the parent or the child. Neither does the parental obligation which is the birthright of every child.

SUPPORT is a non-legal court-approved program that assists clients with issues of child support and custody. SUPPORT has followed the Clark-Jeter Case closely since it originated in Allegheny County. Last year we entered a Friend of the Court brief as this case progressed to our Supreme Court. Our concern is the non-retroactivity of filing and how this will affect many children, not just financially but in other ways such as concerning knowledge of their heredity. Everyone has a right to know about such factors as diseases that run in the family. This case will affect many people, and I feel that our courts erred grossly in this decision.

The Women's Law Project is a Pennsylvania-based, non-profit law firm, dedicated to advancing the status and opportunities of women through litigation, public education, research, and individual counseling. Together

with Women in Transition, a social service agency focusing on the needs of women, the Women's Law Project is engaged in the Philadelphia Child Support Project, whose goal is to increase, through direct service and advocacy, the number of Philadelphia children receiving adequate and consistent child support. We believe that the opinion of the Pennsylvania court in this case creates an arbitrary distinction between classes of children equally in need of support, and would undermine the efforts of the Philadelphia Child Support Project to ensure that children in single-parent families receive adequate support.